A COMPARATIVE STUDY OF THE EFFECTIVENESS OF BIDDER REMEDIES IN SOUTH AFRICA AND NIGERIA

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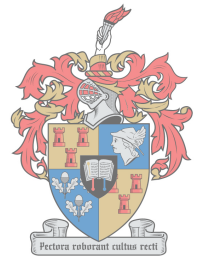

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Declaration

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Abstract

The Guide to Enactment identified that a bidder remedies system helps to make procurement law to "an important degree self-policing and self-enforcing". This is because it provides an avenue to litigate for bidders that have interest in monitoring procuring entities' compliance with the procurement rules. In an attempt to protect their rights or to remedy the injury caused by breach of procurement rules, bidders act as "private attorney generals" to enforce compliance. Bidder remedies regime is an integral part of the public procurement systems of many countries in Africa. Nigeria and South Africa are examples of African countries that have such regimes. Bidder remedies have assumed an academic and practical importance due to the actual and perceived role that it plays in the proper functioning of a public procurement system. Although research interest in bidder remedies has been on the increase globally, only a negligible portion of the research focuses on Africa. The information gap that exists due to the availability of very little academic information on bidder remedies in Africa remains to be filled, by detailed research. This study fills this information gap by undertaking an in-depth comparative analysis of the bidder remedies systems of Nigeria and South Africa, and assessing their effectiveness using clearly identified yardsticks/elements.

The key research question which this study addressed towards achieving the above, was: "Whether the bidder remedies regimes of South Africa and Nigeria are effective for the enforcement of public procurement rules?"

This study was conducted by way of doctrinal legal analysis. The study adopted a comparative approach in analysing the bidder remedies systems of South Africa and Nigeria, with a view to assessing their respective effectiveness in enforcing public procurement law. Analytical references were made to the bidder remedies regimes provided under international regulatory regimes, such as the UNCITRAL Model Law on Public Procurement. The primary materials which this study relied on are relevant legislation and case laws from both jurisdictions. Similarities as well as striking differences exist between the South African and Nigerian bidder remedies regimes, which made the systems suitable for a comparative study. The study established that the bidder remedies systems of both countries are reasonably effective, although this is undermined by certain legal and structural factors. The key finding is that the design of bidder remedies systems affects their effectiveness. Thus, based on this and the lessons obtained from studying the two systems, this work towards the end presented a blueprint for any country wishing to design or redesign its remedies systems.

Opsomming

Die Guide to Enactment het bevind dat 'n bieër-remediesisteem help om die verkrygingsreg 'n belangrike mate van selfpolisiëring en self-afdwinging te maak. Dit is omdat dit 'n laan bied vir die bieërs wat belang het in die monitering van die verkryging van entiteite se nakoming van die verkrygingsreëls. In 'n poging om hul regte te beskerm of om die besering wat veroorsaak word deur die skending van die verkrygingsreëls te verhelp, tree bieërs op as "private prokureur generaals" om nakoming te handhaaf. Bieërremedie regime is 'n integrale deel van die openbare verkryging stelsels van baie lande in Afrika. Nigerië en Suid-Afrika is voorbeelde van Afrika-lande wat sulke regimes het. Bieërremedies het 'n akademiese en praktiese belang aangeneem as gevolg van die werklike en waargenome rol wat dit speel in die behoorlike funksionering van 'n openbare verkrygingsisteem. Alhoewel navorsingsbelang in bieërmedisyne wêreldwyd aan die toeneem is, fokus slegs 'n onbeduidende gedeelte van die navorsing op Afrika. Die inligtingsgaping wat bestaan weens die beskikbaarheid van baie min akademiese inligting oor bieërmedisyne in Afrika, moet nog gevul word deur gedetailleerde navorsing. Hierdie studie vul hierdie inligtingsgaping deur 'n in-diepte vergelykende analise van die bieër-remediesisteme van Nigerië en Suid-Afrika te onderneem en die effektiwiteit daarvan te assesseer deur gebruik te maak van duidelik geïdentifiseerde maatstawwe / elemente.

Die sleutelnavorsingsvraag wat hierdie studie aangespreek het om bogenoemde te bereik, was: "Of die bodemremedieregimes van Suid-Afrika en Nigerië effektief is vir die handhawing van reëls vir openbare verkryging?"

Hierdie studie is deur middel van leerstellige regsanalise uitgevoer. Die studie het 'n vergelykende benadering aangewend om die bieërremediesisteme van Suid-Afrika en Nigerië te ontleed met die oog op die beoordeling van hul onderskeie effektiwiteit in die afdwinging van die wet op die verkryging van openbare aankope. Analitiese verwysings is gemaak aan die bieër regstellings regimes wat voorsien word onder internasionale regulatoriese regimes, soos die UNCITRAL Model Wet op Openbare Verkryging. Die primêre materiaal waarop hierdie studie berus, is relevante wetgewing en regspraak van beide jurisdiksies. Gelykhede sowel as opvallende verskille bestaan tussen die Suid-Afrikaanse en Nigeriese bodemremedie-regimes, wat die stelsels geskik gemaak het vir 'n vergelykende studie. Die studie het bevind dat die bieër-remedies-stelsels van beide lande redelik effektief is, hoewel dit deur sekere regs- en strukturele faktore ondermyn word. Die sleutelbevinding is dat die ontwerp van bieërmedisyne

stelsels hul effektiwiteit beïnvloed. Op grond van hierdie en die lesse wat verkry is om die twee stelsels te bestudeer, het hierdie werk tot die einde 'n bloudruk voorgestel vir enige land wat sy remediesisteem wil ontwerp of herontwerp.

Acknowledgment

This study was inspired by Prof Sue Arrowsmith, who had relentlessly encouraged me to do a PhD, right from my days in University of Nottingham for LLM (2007/2008), up to the day we met again at Stellenbosch for the African Public Procurement Regulation Conference in 2011. With gratitude I acknowledge that she finally got Prof Geo Quinot and Prof Sope William-Elegbe involved; and these two outstanding academics became my supervisors. From that day forward, they supported me with their time, resources, and their intellectual and emotional intelligence. I am deeply grateful for their insistence on excellence. I know they read every line of this work and paid attention to every detail. I am wondering whether I have met all their academic expectations.

My family, particularly my wife, Chinagolum, showed me a lot of love; manifesting in diverse forms of support to this work. They continually demonstrated their faith in my ability to complete the study, and it encouraged me to carry on.

My friends and colleagues provided me with materials and perspectives. Worthy of mention among them are Uchenna Ibe, Michell Brooks, and Salim Magashi.

The free access database of the Southern African Legal Information Institute provided me with virtually all South African case laws and legislation that I required for this study. I deeply appreciate its invaluable contribution to legal studies. I hope I will soon give back to its sustenance.

Table of content

List of abbreviations

AAA	Accra Agenda for Action 2008
ADR	Alternative Dispute Resolution
AGSA	Auditor-General of South Africa
Art	Article
B-BBBE	Broad-Based Black Economic Empowerment
BPP	Bureau of Public Procurement
Cap	Chapter
CC	Constitutional Court
CEO	Chief Executive Officer
CFRN	Constitution of the Federal Republic of Nigeria
Ch	Chapter
COMESA	Common Market for Eastern and Southern Africa
CSO	Civil Society Organisation
EC	European Commission
ECOWAS	Economic Community of West African States
EFCC	Economic and Financial Crimes Commission
Ed	Edition or Editor
EDF	European Development Fund
ESA	external support agency
EU	European Union
FEC	Federal Executive Council
FHC	Federal High Court
FOIA	Freedom of Information
Fn	Footnote

FR	Financial Regulations
GATT	General Agreement on Tariffs and Trade
GG	Government Gazette
GN	Gazette Number
GPA	Agreement of Government Procurement
HC	High Court
IBRD	International Bank for Reconstruction and Development.
ICPC	Independent Corrupt Practices and Other Related Offences Commission
IDA	International Development Association
INTOSAI	International Organisation of Supreme Audit Institutions
LFN	Laws of the Federation of Nigeria
OECD	Organisation for Economic Co-operation and Development
MAPS	Methodology for the Assessment of National Procurement Systems
NAFTA	North Atlantic Free Trade Agreement
NCPP	National Council on Public Procurement
NDPP	National Director of Public Prosecutions
NGO	Non-governmental organisation
NPA	National Prosecuting Authority
No	Number
PAA	Public Audit Act No 25 of 2004
PAJA	Promotion of Access to Justice Act
PAIA	Promotion of Access to Information Act
Para	Paragraph
PFMA	Public Finance Management Act
PPA	Public Procurement Act
PPP	Public Private Partnership

Reg	Regulation
RFP	Request for Proposal
R & D	Research and Development
S	section
SA	South Africa
SACU	Southern African Customs Union
SADC	Southern African Development Community
SASSA	South African Social Security Agency
SCA	Supreme Court Apeal
Sch	Schedule
SITA	State Information Technology Agency
SALRC	South Africa Law Reform Commission
Ss	Sections
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
USAID	United States Agency for International Development
Vol	Volume
WSSSRP	Water Supply and Sanitation Sector Reform Programme
WTO	World Trade Organisation

Chapter 1

Introduction

1 1 Background

Most African countries have laws to regulate their government procurement, in line with global trends.[1] However, what has remained a major concern is whether these laws are adequately being adhered to or enforced. It has been widely recognized that an effective means of enforcing public procurement regulation is by vesting bidders[2] with the right to challenge breaches of procurement rules by procuring entities.[3] In exercising this right, suppliers may obtain remedies for losses or injuries suffered as a result of the breach of procurement rules; in addition, the procuring entity could be ordered by the challenge forum to comply with applicable rule or law. This procurement enforcement mechanism is here referred to as "bidder remedies".[4]

Bidder remedies regime is an integral part of the public procurement systems of many countries in Africa.[5] Nigeria and South Africa are two of such countries that have bidder

[1] Examples include: Botswana Public Procurement and Asset Disposal Act 2001 (as amended); Ethiopia Federal Government Procurement and Property Administration Proclamation No. 649/2009; Ghana Public Procurement Act 663 of 2003 (as amended by Act 914 of 2016); Kenya Public Procurement Act No 33 of 2015, Nigeria Public Procurement Act 2007; Rwanda Public Procurement Law No 12/2007 of 27/03/2007; the Constitution of the Republic of South Africa 1996 s 217, and Preferential Procurement Policy Framework Act No 5 of 2000; Tanzania Public Procurement Act 2011; Uganda Public Procurement and Disposal of Public Assets Act 2003 (as amended by Act No 11 of 2011); and, Zimbabwe Public Procurement and Disposal of Public Assets Act ch 22:23 2017.

[2] In this study, unless it is expressly stated otherwise, or the context otherwise requires, "bidder" includes a supplier, contractor or consultant that is interested in or that actually submitted bids for a particular procurement contract. Thus, the terms "bidder", "supplier", "contractor" are largely used interchangeably.

[3] See Guide to Enactment of the 2011 UNCITRAL Model Law on Public Procurement 95, 228; S Arrowsmith "Remedies for Enforcement the Procurement Rules" in S Arrowsmith (ed) *Public Procurement in the European Community* Vol IV (1993) 1 3. See also G Quinot "A Comparative Perspective on Supplier Remedies in African Public Procurement Systems" in G Quinot & S Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) 390; D Gordon "Constructing a Bid Protest Process: The Choices that Every Procurement Challenge System Must Make" (2006) 35 *Pub Contract LJ* 427 428.

[4] The mechanism is also referred to as "supplier remedies", "supplier review", "challenge proceedings", "bid protest", "bid challenge", "complaints mechanism" depending on the jurisdiction, the wordings of the various laws or the authors. Bidder remedies as a concept is analysed in chapter 3.

[5] Examples include: Botswana Public Procurement Act, ss 53, 95-109; Ethiopia Federal Government Procurement and Property Administration Proclamation 15(7), chs 13 & 14); Ghana Public Procurement Act (as amended) ss 78-82; Kenya Public Procurement Act ss 167-175; Nigeria Public Procurement Act s 54; Rwanda Public Procurement Law ch IV; South Africa reg.16A9.3 of the Treasury Regulations under the Public Finance Management Act, reg.49 (read with reg.50) of the Municipal Supply Chain Management Regulations under the Municipal Finance Management Act; Local Government: Municipal Systems Act 32 of 2000 s 62; Tanzania Public Procurement Act part IX; Uganda Public Procurement Act part VII; and, Zimbabwe Public Procurement Act part x.

remedies regime. Bidder remedies have assumed an academic and practical importance as a result of the actual and perceived role that it plays in the proper functioning of a public procurement system.[6] Research interest in bidder remedies has been on the increase globally; although, only a negligible portion of such research focuses on Africa. There are various contemporary issues that have engaged leading practitioners and scholars in this regard. One of the issues is the extent of effectiveness of bidder remedies as a means of securing compliance with procurement rules. The general view is that having a bidder remedies regime is beneficial to suppliers and the procurement system.[7] However, some scholars have argued that the mechanism may actually be disadvantageous to the procurement process.[8] For example, it is possible that aggrieved suppliers may resort to speculative instigation of review process, which leads to avoidable disruption of the procurement process. However, the advantages or disadvantages of a remedies regime depend on the design and operation of the regime. As noted by Arrowsmith, Linarelli & Wallace:

> "The potential adverse effects of litigation will be affected by the characteristics of the regulatory rules, in particular whether their requirements are clear. They will also be affected by the features of the remedies system itself…"[9]

Another research interest is the comparative analysis of bidder remedies in different countries. Using findings from an empirical study, Pachnou compared the operation of the bidder remedies systems of United Kingdom and Greece.[10] She identified some similarities and differences in how the remedies are perceived by their end users in the countries studied and their resultant responses towards exploiting the remedies. One of the legal theories propounded by Pachnou is that the willingness or reluctance of bidders to explore bidder remedies when they perceive a breach of rules depends on the features of the review system. Particularly, that where there are procedural difficulties in the procurement law or the review process, which reduces the chances of getting remedies for breaches, the suppliers become reluctant to seek

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[6] Discussed in 2 3 2 below.

[7] See fn 2 above.

[8] S Arrowsmith *Government Procurement and Judicial Review* (1988) 305; R Marshal, M Meurer, & J F Richard "Curbing Agency Problems in the Procurement Process by Protest Oversight" (1994) 25 *Rand Journal of Economics* 297.

[9] S Arrowsmith, J Linarelli, & D Wallace *Regulating Public Procurement: National and International Perspectives* (2000) 760.

[10] D Pachnou *The Effectiveness of Bidder Remedies for Enforcing the EC Public Procurement Rules: a Case Study of the Public Works Sector in the United Kingdom and Greece* PhD thesis University of Nottingham (2003).

procurement review.[11] This finding may be applied in studying or understanding other systems. However, one is mindful that the social context of United Kingdom and Greece, studied by Pachnou, is not quite similar to those found in some other regions, especially Africa. This factor, among others, limits the transposition of the findings and lessons of the study to other regions. The need to comparatively study other countries remains relevant and justifiable. That is why the comparative analysis by Quinot of the bidder remedies systems of some African countries is apposite.[12] The analysis raised some cogent issues that call for further study or analysis. One of such issues is how the systems attempt to balance the interest of transparency in procurement (perceived to be enhanced by bidder remedies), with the interest of avoiding financial losses to the government due to disruption of procurement contracts caused by challenge proceedings.[13] However, as Quinot pointed out,[14] the chapter does not provide a detailed analysis of bidder remedies regimes in the procurement systems reviewed, which included Nigeria and South Africa. It is necessarily a broad overview aimed at highlighting patterns in supplier remedies operating in Africa. Thus, the information gap that exists due to the availability of very little academic information on bidder remedies in Africa still remains to be filled, by detailed research.[15]

This study integrates and substantially extends existing findings, theories and analysis on bidder remedies, especially as they relate to Africa, particularly Nigeria and South Africa. Its focus is to comparatively analyse the bidder remedies systems of Nigeria and South Africa, and assess the extent of their effectiveness compared with the relevant indicators or elements identified in 2 4 3 below. In addition, aspects of these systems are compared with leading international procurement regimes, particularly, the UNCITRAL Model Law on Public Procurement ("UNCITRAL Model Law"). The doctrinal legal analysis and structure of this study could afford a template for assessing the effectiveness of other bidder remedies systems.

[11] 431.
[12] Quinot "Supplier Remedies" in *Public Procurement Regulation* 308.
[13] 330-335.
[14] 309.
[15] Apart from Quinot "Supplier Remedies" in *Public Procurement Regulation*; a few other published work on this topic at present include: G Quinot "Enforcement of procurement law from a South African perspective" (2011) 20 *PPLR* 193-207; G Quinot 'Towards Effective Judicial Review of State Commercial Activity' (2009) 3 *TSAR* 436-449; and KT Udeh "A Critical Analysis of the Legal Framework for Supplier Remedies System of Kenya in the Light of International Standards" (2012) 21(5) *PPLR* 183.

1 2 Research Objectives

As a background on the objectives of this study, it is apt to cite Gordon who had noted that:

> "[T]he striking similarities in the challenges and benefits of various bid protest systems mean that there are rich opportunities for comparative review. Indeed, we will be remiss if we do not learn as much as we can about others' successes and failures in their own protest systems." [16]

As would be expatiated upon under subheading 1 4 below, there are similarities in the legal systems of Nigeria and South Africa, as well as similarities in the bidder remedies systems of both countries. Equally, there are other aspects of the two systems that differ, which necessarily lead to different outcomes in these systems in terms of enforcing public procurement rules. The similar and varying aspects of the systems could be analysed to determine how they impact on the effectiveness of the regimes in enforcing procurement rules. Furthermore, lessons could be drawn from the comparative assessment of these systems and transposed to improve the effectiveness of the systems studied. It is these ends that this study pursues.

Specifically, the objectives of this study are to:

a. Analytically compare the bidder remedies regimes of South Africa and Nigeria, with a view to assessing their effectiveness as mechanisms for enforcing procurement rules in both jurisdictions;

b. Identify and appraise the inherent legal and practical factors that hamper the effectiveness of the available bidder remedies in both jurisdictions;

c. Present suggestions for improving the effectiveness of the bidder remedies regimes under review, based on the findings made by the study and relying on applicable jurisprudence.

To achieve the aforementioned research objectives, this study had set out to address a key research question, that is:

> "Whether the bidder remedies regimes of South Africa and Nigeria are effective for the enforcement of public procurement rules."

1 3 Methodology

As stated earlier, this study is conducted by doctrinal legal analysis. The study adopts a comparative approach in analysing the bidder remedies systems of South Africa and Nigeria,

[16] Gordon (2006) *Pub Contract LJ* 445.

with a view to assessing their respective effectiveness in enforcing public procurement regulation. Notwithstanding that the focus of this study is on South Africa and Nigeria, analytical references are made to the bidder remedies regime provided by UNCITRAL, the European Union and the World Trade Organization ("WTO"). The reference to these other regimes is only for the purposes of critical assessment of the South African and Nigerian systems. The primary materials which this study relies on for the comparative analysis are relevant legislation and case laws from the jurisdictions studied. This is because the bidder remedies systems are mainly products of legislation; and the interpretation given to the relevant legislation by judicial and quasi-judicial bodies may explicate or modify the legislation. Also, relevant subsidiary legislation, policy documents and quasi-legal instruments, which are important in the countries studied, are considered. Established practice and procedures before the administrative review bodies and the courts, as contained in documents and as seen in operation are compared. The secondary materials considered are academic literature, and the opinions and theories of scholars that are relevant to the subject-matter.

There are two main reasons for adopting the comparative method here. First, acquiring and comparing the knowledge of bidder remedies in the countries studied affords a better and wider understanding of bidder remedies, than where only one regime is studied. Secondly, it identifies the different approaches and solutions offered by the systems studied, to similar challenges and issues. In addition, the strengths and weaknesses of the approaches and solutions offered by the regimes become more glaring when compared. This could stimulate law reviews in these jurisdictions. This is even more relevant for bidder remedies, since it is a relatively new legal development and research interest.

1 4 Choice of jurisdictions

There are cogent reasons for the choice of South Africa and Nigeria for this comparative study. First, public procurement in Africa has not been widely researched. The academic resources that exist so far on bidder remedies regimes in Africa have been limited to a few published articles and chapters of a few books.[17] There is no known doctoral thesis on bidder remedies in Africa. Conversely, there are several published works and a doctoral thesis on remedies

[17] See fn 13 above.

regimes in Europe.[18] This study of the South African and Nigerian bidder remedies regimes will help to close the research gap on bidder remedies in Africa.

Secondly, both are African countries that have bidder remedies regimes. The remedies regimes of both countries have operated for a length of time that suffices to provide resources for the comparative examination of their effectiveness.

Thirdly, the procurement spending and the market size of the two countries in relation to Africa are significant. The economies of South Africa and Nigeria comprised over 50% of Gross Domestic Product (GDP) of Sub-Saharan Africa.[19] They are the largest markets in Sub-Saharan Africa; and public procurement spending is huge in both countries.[20] The actual and potential role that bidder remedies may play in these economies makes this study imperative.

Fourthly, there are similarities as well as striking differences between the South African and Nigerian bidder remedies regimes, which make the systems suitable for a comparative study. For instance, both the Nigerian and South African remedies regimes provide for administrative and judicial enforcements in the procurement review process. Conversely, the South African bidder remedies system is based on several pieces of legislation; while the Nigerian remedies system is a creation of single public procurement legislation. The federal government of Nigeria has its own procurement regime, and the various states have their separate regimes. This study, as it relates to Nigeria, is focused on the federal procurement system and its bidder remedies. In South Africa, regulation of public procurement is largely uniform within each tier of government; but not uniform vertically across the tiers; yet the

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[18] A few of these include: Arrowsmith "Remedies for Enforcing the Public Procurement Rules" in S Arrowsmith (ed) *Public Procurement in the European Community* Vol IV (1993); Arrowsmith *Procurement and Judicial Review*; P Trepte *Public Procurement in the EU: a Practitioner's Guide* 2 ed (2007); H J PrieB & P Friton "Designing Effective Challenge Procedures: The EU's Experience with Remedies" in S Arrowsmith & R D Anderson (eds) *The WTO Regime on Government Procurement: Challenge and Reform* (2011) 526; Pachnou *Effectiveness of Bidder Remedies*.

[19] The World Bank "50 Things You Didn't Know About Africa" (2013) *Statistics in Africa* <http://go.worldbank.org/58IOKF4O80> (accessed 29-08-2017).

[20] Nigeria estimated public procurement spend (capital expenditure) for 2017 was N 2,177,866,775,867: Appropriation Act 2017 schedule part D; Budget Office of the Federation "2017 Appropriation Act" (29-06-2017) *Budget Office of the Federation* <http://www.budgetoffice.gov.ng/index.php/resources/internal-resources/executive-order/2017-appropriation-act> (accessed 31-01-2018). South Africa had an annual procurement spend of R500bn as at 2016: A Scott "South Africa reforms public procurement to save R25bn" (26-02-2016) *Supply Management (CIPS)* <https://www.cips.org/supply-management/news/2016/february/south-africa-to-reform-public-procurement-processes/> (accessed 31-01-2018); P Bolton "Public Procurement as a Tool to Drive Innovation in South Africa" (2016) 19 *PER/PELJ* subheading 3. See Statistics South Africa "The Economy of South Africa" (30-01-2018) *STATS SA* < http://www.statssa.gov.za/?page_id=595> (accessed 31-01-2018).

country's main procurement legislation[21] apply to all the tiers. Furthermore, Nigeria's remedies regime is modelled after the UNCITRAL Model Law 1994; while the South African regime is an offshoot of combined application of legal rules from various distinct fields of South African law. Some of the issues that arise as a result of these similarities and differences, which a comparative analysis can address include: how do the distinguishing features of the two regimes affect their effectiveness? Which of the two regimes has features that are more effective in enforcing procurement rules? Could practical lessons be learnt from each regime, which may offer a source of improvement in the administration of the other regime? It is expected that the comparative study would offer valuable mutual lessons for both countries and may actually lead to possible future modification of the existing bidder remedies regime in the two countries. As Quinot pointed out:

> "The eventual question is thus how to proceed in developing a new public procurement remedies regime for South Africa. *In answering this question comparative insights will be important*..."[22]

Finally, the researcher has practical knowledge of bidder remedies in Nigeria, having conducted prior research on the Nigerian public procurement system. In addition, he has been involved in handling cases of procurement challenge in Nigeria. On the other hand, there are several published materials on the supplier remedies system of South Africa. There are numerous reported cases on South African procurement challenge. South African legal documents on the subject matter are easily accessible. Also, there are government officials, scholars and practitioners in South Africa who provided valuable information on South African bidder remedies regime, especially on practice and procedures before the administrative bodies and the courts. In other words, materials were available to enable a research on the South African bidder remedies system. With this background, it is reasonable that South Africa and Nigeria were chosen for this study.

1 5 Major findings and structure of the study

The overarching finding, and the thesis statement of this study, is that the design of the bidder remedies systems affects their effectiveness. This confirms similar finding and postulation of

[21] Preferential Procurement Policy Framework Act No 5 of 2000 (PPPFA), and s 217 of the South African Constitution.

[22] Quinot (2011) *PPLR* 207 (emphasis added).

earlier studies on remedies systems.[23] However, this study is original, and substantially contributes to the limited research on the subject; as it specifically focuses on bidder remedies of Nigeria and South Africa. These systems have not been explored in a comprehensive and systematic manner as this study does. It fills the research and knowledge gap in the literature through the assessment of the effectiveness of remedies systems, and how they should be reformed; specifically, in relation to the two jurisdictions, and generally, in relation to African and global public procurement regulation. The study is far more in-depth than existing scholarship on the subject, in relation to the two jurisdictions, and Africa generally.[24] The study is placed in the context of existing research. The proposals it makes for reform are unique and based on the findings of this research. Its comparative and interpretive methods afforded it the opportunity to identify what works and what does not work in the two jurisdictions, and to provide a context for the jurisdictions to cross-learn from each other.

This study is comprised of nine chapters. The current chapter has presented a general introduction, which sets out the background and objectives of the study, and the research methodology. Chapter 2 establishes certain doctrinal foundation upon which bidder remedies and the other mechanisms for enforcing procurement law in Nigeria and South Africa are subsequently analysed. Specifically, the chapter explores the relationship between regulating public procurement and enforcing the regulations; and establishes that public procurement regulation necessarily requires enforcement to make it efficacious. It also examines the general features of bidder remedies as an enforcement mechanism. In addition, it identifies the elements or indicators for assessing the effectiveness of bidder remedies systems.

From Chapter 3 onward, the study narrows down to the Nigerian and South African public procurement systems. The chapter analyzes how these countries structure their public procurement; and gives an overview of the institutional frameworks involved in public procurement enforcement in these jurisdictions. A major finding under this chapter is that while the tiers of government in South Africa have a largely uniform procurement regime, Nigeria operates separate procurement regimes at the various tiers. These different situations have implications for the remedies systems, as discussed in the chapter. Another major finding in chapter 3 is that membership of both countries in intergovernmental organizations does not

[23] See Pachnou *Effectiveness of Bidder Remedies* 76, 431; Arrowsmith et al *Regulating Public Procurement* 760; Quinot "Supplier Remedies" in *Public Procurement Regulation* 391; P Craig & G De Burca *EU Law. Texts, Cases and Materials* 2 ed (1998) 235.

[24] Examples include: Quinot "Supplier Remedies" in *Public Procurement Regulation*: Quinot (2011) *PPLR* 193-207; Quinot (2009) *TSAR* 436-449; and Udeh (2012) *PPLR* 183

directly impact upon their bidder remedies systems, for reasons presented in that chapter. Chapter 4 traces the historical development of the public procurement regulatory regimes of Nigeria and South Africa from the old to the current; with analytical focus on their features that relate to bidder remedies and enforcement. In this regard, the improvements made by the current regulatory regimes over the old are identified. The major findings of this chapter are that the current regimes in both jurisdictions: (1) grant bidders a general right to challenge procurement decisions of procuring entity, and to have access to relevant records; (2) do not exempt any unlawful acts or decisions in a procurement procedure from review; and, (3) provide, at least, a body to hear a challenge as a first step and a further body to hear an appeal as a second step.

Chapters 5 to 7 comparatively examine the features and effectiveness of the various bidder remedies mechanisms in Nigeria and South Africa: the internal administrative review, external administrative review, and judicial recourse, respectively. The components of these mechanisms analysed include: their enabling legislative provisions, causes of action or grounds of review, *locus standi* and parties to proceedings, the forums, commencement procedures and timeframes, access to procurement records for purpose of the proceedings, the procedures and duration of proceedings, available remedies and appeal, and the enforcement. Apart from examining the internal review mechanisms, chapter 5 initially presents an overview of the bidder remedies systems of Nigeria and South Africa; highlighting the objectives of the systems, the structuring of the systems, also the limits of the application of standstill period, and the extent to which donors' bidder remedies regimes apply to their funded procurement in both countries. A major finding in chapter 5 is that the internal review mechanisms in both countries are similar in a few respects, as follows: their jurisdiction is limited to the procurement undertaken by a particular tier of government; they are the compulsory first remedy; review is by considering written submission of parties; and, review decisions are binding and appealable. However, dissimilarities exist in most other aspects. The major finding of chapter 6 is that Nigerian (federal) external review mechanism is well structured and effective; whereas, its South African counterpart is unsystematic, structurally inchoate, and ineffective. In chapter 7, the major finding is that procurement judicial remedies in both jurisdictions are substantially effective in relation to the relevant elements considered. Nevertheless, certain factors, discussed in the chapter, undermine the advantages of these judicial remedies regimes.

Chapter 8 comparatively examines other mechanisms for redressing breaches and enforcing public procurement regulations in both jurisdictions. Such mechanisms considered include: alternative dispute resolution; investigation, administrative remedial actions, and sanctions; audit; and CSOs' action. The major findings of chapter 8 are as follows: (1) ADR is effective for resolving procurement disputes where an organ of government engages another organ for its procurement, for it accords with routine inter-governmental relations; (2) investigation, and the concomitant remedial action or sanctions, are effective where there is a report or a reasonable suspicion of procurement-related offences, since bidder remedies cannot effectively address this criminal aspect; and, (3) the relevance of procurement audit lies in detecting and suggesting redress against institutional lapses that encourage procurement breaches or corruption.

Chapter 9 presents a summary of key findings and draws some conclusions on the overall effectiveness of the bidder remedies systems under review; and presents practical recommendations on improving the effectiveness of each system. It draws from lessons from the two systems to suggest a blueprint for designing a bidder remedies system suitable for the African context.

Chapter 2

Enforcement of Procurement Regulation and the Concept of Bidder Remedies

2 1 Introduction

This chapter examines general issues relating to bidder remedies. Particular references are made to the Nigerian and South African public procurement systems only where apposite. The following issues will be examined in this order: the concept of enforcement and its relevance to public procurement regulation; the concept and essential features of bidder remedies (under which the relationship between bidder remedies and contract dispute proceedings is examined, among other issues); the elements of an effective bidder remedies system; and the relationships between bidder remedies and other procurement enforcement mechanisms. This will provide a basis for the detailed assessment of the two systems in subsequent chapters.

2 2 Enforcement and Procurement Regulation

2 2 1 Concept of Legal Enforcement

There are different views on what constitutes a legal enforcement. John Austin had postulated that enforcement must involve the use or threat of sanction to actualise the dictate of law or a command of a sovereign; and must be accomplished by the power of the state or officials internal to the regime.[1] Many scholars agree with this conception of law and enforcement.[2] A view in support was expressed thus: "[A]n order will be called… law if it is externally guaranteed by the probability that physical or psychological coercion will be applied by a *staff* of people in order to bring about compliance or avenge violation."[3] However, the Austinian conception of enforcement has been viewed as too restrictive by some scholars.[4] One of such views holds that: "[Sanctions and force] do not represent a logical feature of our concept of law. . . . Is it possible for there to be a legal system in force which does not provide for sanctions or which does not authorize their enforcement *by force*? The answer seems to be that it is

[1] J Austin *The Province of Jurisprudence Determined* (1832) 6-8 11 19-20 28.

[2] See for example: M Weber "The Profession and Vocation of Politics" in P Lassman (ed) *Political Writings* (1919) 309 310-11; H Kelsen *General Theory of Law and State* A Wedberg (trans) (1945) 21; M Weber *Economy and Society* (1978) (1921-22) 34. See also J Finnis *Natural Law and Natural Rights* 2 ed (2011) 260-264 266-270; R Dworkin *Law's Empire* (1986) 93.

[3] Weber *Economy and Society* 34.

[4] J Kleinfeld "Skeptical Internationalism: A Study of Whether International Law Is Law" (2010) 78 *Fordham L Rev* 2451 2505-2506; J Kleinfeld "Enforcement and the Concept of Law" (2011) 121 *Yale L J Online* 293 302; J Raz *Practical Reason and Norms* (1975) 158. See also S J Shapiro *Legality* (2011) 169.

humanly impossible but logically possible."[5] Remedies derived from a challenge proceeding may be regarded in some sense as sanctions, but it is not tenable to hold that the bidder that initiated the enforcement used force. Although it could be viewed that the bidder by instituting a challenge proceeding has indirectly invoked *force* (of law), as the review body may give decisions or remedies which the state may use *force* to execute. Perhaps, the major argument against Austin's postulation is that it assumes that to have a governmental overlord with power to inflict sanction is simply what enforcement means.[6] This assumption may not be unconnected to the legal realities in England at the time Austin wrote, which was the non-liability of the Crown, particularly in tort.[7] In England, Crown subjection to normal legal liability was only statutorily established in 1947 with the passing of the Crown Proceedings Act 1947.[8] In contemporary times, it has become frequent for governments and their agencies to be compelled by the legal actions of individuals or subjects to comply with the dictates of law. As will be seen in detail in section 2 3 below, this is what obtains in bidder remedies proceedings, as they are usually instituted by individual bidders to compel government procuring entities to comply with the law.

Broader conceptions of enforcement have therefore been proposed. One of such, adopted in public procurement literature,[9] defines enforcement as "any rules and principles of organisational or substantive nature which concern actions in law aiming at judicial protection".[10] A deficiency in this definition is that it limits enforcement to only judicial remedies; whereas enforcement could, inter alia, be in the form of administrative remedies.[11]

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[5] Raz *Reason and Norms* 158, (emphasis added).

[6] Kleinfeld (2010) *Fordham L Rev* 2505-2506; Kleinfeld (2011) *Yale L J Online* 302.

[7] See *Raleigh v Goschen* (1898) 1 Ch. 73, *Mullins v Secretary of State for War* (1926) 43 T.L.R. 106 and *MacKenzie-Kennedy v Air Council* (1927) 2 KB.517. See also *Binda v Colonial Government* (1887) 5 SC 284 291 297; and *Ransome-Kuti v A G of the Federation* [1985] 2 NSCC 879.

[8] G Quinot *State Commercial Activity: A Legal Framework* (2009); G Williams *Crown Proceedings: an Account of Civil Proceedings by and against the Crown as Affected by the Crown Proceedings Act, 1947* (1948) 1 & 16; S Arrowsmith *The Law of Public & Utilities Procurement* 2 ed (2005) 114; *Matthews v Ministry of Defence* [2003] UKHL 4 paras 83-87. See also S Deakin, A Johnston & B Markesinis *Markesinis and Deakin's Tort Law* 7 ed (2012) 344; WV Horton Rogers "Liability for Damage Caused by Others under English Law" in J Spier & F Busnelli (eds) *Unification of Tort Law: Liability for Damage Caused by Others* (2003) 63 77.

[9] D Pachnou "Enforcement of the EC Procurement Rules: the Standards Required of National Review Systems under EC Law in the Context of the Principle of Effectiveness" (2000) 2 *PPLR* 55 55.

[10] S Prechal "E.C. Requirements for an Effective Judicial Remedy" in J Lonbay & A Biondi (eds) *Remedies for Breach of E C Law* (1997) 3.

[11] These include: administrative review, administrative rulemaking proceedings, petition for reconsideration, etc. See MR Gelpe "Exhaustion of Administrative Remedies: The Lesson from Environmental Cases" (1985) 53 *George Washington Law Review* 1 5-7.

A definition regarded here as more apposite reads: "legal enforcement is the activity by which a legally constituted power is applied to make the law's dictates actual."[12] This definition will be adopted as the meaning of enforcement in this study, because it captures the essence of bidder remedies as a procurement law enforcement mechanism. The definition is briefly analysed in relation to bidder remedies to support this assertion. Bidder remedies involves initiation of a review action (*activity*), by an aggrieved bidder or potential bidder in pursuance of the right vested on it by law (*legally constituted power*), to challenge and redress non-compliance with procurement regulations (*applied to make the law's dictates actual*). Furthermore, this definition of enforcement is preferred to the former, as it encompasses all possible remedies derivable from bidder-initiated review, which include both administrative and judicial remedies. The concept of bidder remedies is further discussed in detail in section 2 3 below.

2 2 2 Enforcement vis-à-vis Procurement Regulation

Enforcement through bidder challenge proceeding commonly arises in jurisdictions where public procurement is regulated by law, as non-compliance with the procurement regulation is the main basis upon which a bidder seeks redress. Even in jurisdictions where a bidder's right to challenge is not created by procurement legislation, but instead regarded as part of general civil or constitutional right, there would usually be legislation on procurement, the breach of which can activate the right of challenge. For example, in Belgium, which has a history of Roman Dutch law,[13] the right of bidder challenge is regarded as part of the general constitutional "civil right" or "political right".[14] However, what gives a bidder the standing to exercise this right is mostly that there has been a breach of statutory provision(s) on award of

[12] Kleinfeld (2011) *Yale L J Online* 300.

[13] Up until 1830, Belgium was a colony of Netherlands, which has a history of Roman Dutch law (as would be seen later, Roman Dutch law, apart from common law, is the foundation of the legal system of South Africa, which also was formerly a colony of Netherlands). See University of Oxford "Dutch legal system: quick facts" Oxford LibGuide http://libguides.bodleian.ox.ac.uk/content.php?pid=290644&sid=2387397 (accessed 30/08/2017); see also University of Oxford "Belgian legal system: quick facts" Oxford LibGuide http://libguides.bodleian.ox.ac.uk/content.php?pid=309908&sid=2537549 (accessed 30/08/2017). See further T K Saha *Textbook on Legal Methods, Legal Systems & Research* (2010) 71; and, D Heirbaut "Legal History in Belgium" (2009) 1 *Clio@Themis* 2, 4 <http://www.cliothemis.com/Legal-History-in-Belgium> (accessed 29/04/2017).

[14] D D'Hooghe "Enforcing the Public Procurement Rules in Belgium" (1992) 5 *PPLR* 389 389-394.

government contracts.[15] At common law,[16] various remedies available in bidder challenge, derivable from principles of administrative law, contract and tort, may only be claimed where a legislative provision has been breached. One of such remedies is damages for tort of misfeasance. This arises where a person acting in public office knowingly acts *unlawfully* or *unlawfully* omits to act, which the person knows will probably cause injury.[17] It may also arise in certain cases where the public officer was subjectively reckless as to the *legality* of the act.[18] Another of such possible procurement review remedies includes the tort of breach of statutory duty. This arises where it may be implied that there is a legislative intention to give damages for the breach of statutory duty; however, the court may rarely find such an intention in legislation regulating procurement.[19]

Nevertheless, where there is no procurement regulation, bidders can still in certain circumstances rely solely on general principles of contract, delict/tort or administrative law to challenge a government procurement award. A bidder can sue in contract where a procuring entity advertises in the invitation to bid that it will award to the lowest bidder, but fails to award it accordingly.[20] Also, a bidder can sue where there is a breach of the administrative law principle of natural justice in a procurement process.[21] A bidder can sue in tort where a public

[15] See D'Hooghe (1992) *PPLR* 389 389-394; A Alen *International Encyclopaedia of Constitutional Law: Belgium 118* No. 201. See also the following cases C.S., July 4, 1967, *De Nul*, no. 12511; C.S., May 7, 1981, *Stefens*, no.21147.

[16] As would be seen later, the Nigerian legal system is an offshoot of English common law. In this work references to "common law" refers to English common law, except when it is clearly indicated otherwise as in the case of South Africa, where reference will be made to "South African common law". In South Africa the concept of "common law" does not necessarily mean English common law – common law in South Africa often includes civil law. E.g., South African common law of contract is mostly made up of Roman-Dutch law, i.e. it is civil in nature.

[17] See *Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons* [2002] 2 L.G.L.R. 372; *Bourgoin SA v Ministry of Agriculture* [1986] Q.B 716, CA; *Three Rivers DC v Bank of England (No. 3) (summary judgment)* [2003] A.C 1. See KM Stanton, P Skidmore & M Harris *Statutory Torts* (2003) ch 4; P Craig *Administrative Law* 5ed (2003) 908-914.

[18] See n 17 above.

[19] In *R v Knowsley MBC ex parte Maguire* [1992] 90 L.G.R 653, QBD, Schiemann J. said: "we do not have in our law a general right to damages for maladministration." See Arrowsmith *Public and Utilities Procurement* 1379; see further Stanton *Statutory Torts* ch 2; S Arrowsmith *Civil Liability and Public Authorities* (1992) ch 7.

[20] This is what obtained in the English case of *Harvela Investments Ltd v Royal Trust of Canada (CI) Ltd* [1986] AC 207. Contrast with *Spencer v Harding* (1870) LR 5 CP 561. See also *CBN v System Application Products Nigeria Limited* 3 NWLR (Pt. 911) 152, where the Nigerian court relied on the terms of the invitation to bid issued by the procuring entity to adjudicate over a bidder challenge, in the absence of a public procurement legislation.

[21] In *R v Enfield L.B.C, ex parte Unwin* (1989) C.O.D 466, it was held that a contractor who was heavily dependent on his business with the Council was entitled to fair hearing before being suspended from the Council's list of approved tenderers.

officer has acted improperly with the intention of injuring the bidder.[22] Furthermore, a bidder can bring a delictual claim to challenge a government contract award tainted with fraud.[23] In fact in Nigeria, *Central Bank of Nigeria* ("CBN") *v System Application Products Nigeria Limited*,[24] a bidder review case, was instituted before the enactment of the Public Procurement Act 2007 ("PPA") and entertained on grounds of general principles of contract, tort and administrative law.[25] Apart from procurement legislation, public procurement is also extensively regulated by common law rules in South Africa;[26] as such, breach of common law rules can act as grounds for procurement challenge there. The role played by common law principles in the development of the bidder remedies systems of Nigeria and South Africa is discussed in a subsequent chapter.

For various reasons, the scope of bidder remedies may be limited in jurisdictions that do not have legislation applicable to public procurement. First, relevant administrative remedies may scarcely be available, since such remedies and the authorities that exercise them, are typically creations of legislation applicable to procurement. Second, bidder challenge in the courts may be rare as bidders' right of action will be restricted to breaches of general principles of law applicable to procurement; and these principles are usually not far-reaching in such jurisdictions.[27] This was the case in Nigeria until the enactment of the PPA. It was the same in the United Kingdom ("UK"), before the enactment of its procurement related legislation, particularly the Local Government Act 1988.[28] Third, general principles of administrative law may not be applicable to government procurement in jurisdictions where government contract is governed by private law. For example, it was once widely assumed in the UK that the general

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[22] See *Three Rivers DC v Bank of England (No. 3) (summary judgment)* [2003] A.C 1.

[23] See *Minister of Finance v Gore NO.* 2007 (1) SA 111 (SCA), where the Supreme Court of South Africa awarded delictual damages against a procuring entity for fraudulent conduct of contract award process; the claim was based purely on fraud and not on breach of any procurement statutory duty. Also see *Transnet Limited v Sechaba Photoscan (Pty) Limited* 2005 (1) SA 299 (SCA); *South African Post Office v De Lacy* 2009 (5) SA 255 (SCA) at [2]–[5], [14]; and *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at [55(a)].

[24] (2005) 3 NWLR (Pt. 911) 152.

[25] However, the challenge was unsuccessful.

[26] See Quinot *State Commercial Activity* 134-211; G Quinot "Enforcement of Procurement Law from a South African Perspective" (2011) 20 *PPLR* 193 195. A review of the procurement related legislation of South Africa that is relevant to this study shall be undertaken in chapter 4.

[27] On how this postulation relates to the UK system see S Arrowsmith "Enforcing the EC Public Procurement Rules: the Remedies System in England and Wales" (1992) 2 *PPLR* 92 93-94. See also K T Udeh & L Ahmadu "The Regulatory Framework for Public Procurement in Nigeria" in G Quinot & S Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) 141 153, as it relates to Nigeria.

[28] See n 26 above.

principles of administrative law did not apply to government procurement.[29] However, that perception in the UK has largely changed in favour of applying administrative law to public procurement.[30]

Enacting a procurement law that provides for bidder remedies normally extends the scope of enforcement by bidders, as additional grounds for review and additional remedies may be provided. It tends also to revive remedies derivable from administrative law, delict/tort or contract law, which have not been utilized prior to the enactment.[31] Furthermore, procurement legislation may create special forums for bidder challenge, in addition to the courts or tribunals. This is the case in Nigeria, but not in South Africa, as will be seen later.

2 2 3 Objectives of procurement regulation

Since procurement regulation is a precursor to the operation of bidder remedies, it may be pertinent at this juncture to generally consider why governments enact laws to regulate their procurement. There are nine objectives frequently identified, from procurement legislation and literature,[32] as the objectives of regulating government procurement; namely: competition, integrity, transparency, efficiency, customer satisfaction, value for money, wealth distribution, risk avoidance, and uniformity. However, a legislation that is enacted specifically to provide for and regulate bidder remedies, such as the European Union ("EU") Remedies Directives,[33] will necessarily have its objectives narrowed to enforcing the substantive procurement law and protecting the rights of the aggrieved bidders.[34] The nine objectives of procurement regulation identified above are not exhaustive. For example, procurement legislation could aim at redressing the economic situation of a disadvantaged group of people, as obtainable in South

[29] See S A de Smith, *Judicial Review of Administrative Action* J M Evans (ed) 4 ed (1980) 163; P Cane, *An Introduction to Administrative Law* (1986) 21.

[30] See S Arrowsmith "Government Contract and Public Law" (1990) 10 *L.S* 231; S Arrowsmith "Judicial Review and the Contractual Powers of Public Authorities" (1990) 106 *L.Q.R* 277; S Arrowsmith "Enforcing the EC Public Procurement Rules" (1992) *PPLR* 95. See also *R v Enfield L.B.C, ex parte Unwin* (1989) C.O.D 466.

[31] For example, in Nigeria, prior to the PPA, notwithstanding that bidder remedies proceeding could be initiated based on administrative law principles, contract and tort, that opportunity was hardly utilized.

[32] See S L Schooner "Desiderata: objectives for a system of government contract law" (2002) 2 *PPLR* 103 103-110; S Arrowsmith, L Linarelli & D Wallace *Regulating Public Procurement: National and International Perspectives* (2000) 27-72; Arrowsmith *Public and Utilities Procurement* ch 3; R Boyle "Regulated procurement - a purchaser's perspective" (1995) 3*PPLR* 105 109; S L Schooner "Fear of Oversight: the Fundamental Failure of Businesslike Government" (2001) 50 AMULR 627 630; S Arrowsmith "Towards a Multilateral Agreement on Transparency in Government Procurement" (1998) 47 *Int'l & Comp L Q* 793 796.

[33] Directives 89/665 [1989] O.J. L395/33; and Directives 92/13 [1992] O.J. L76/14, as amended by Directive 2007/66/EC.

[34] On this see Pachnou (2000) *PPLR* 63-64.

Africa under the procurement related Broad-Based Black Economic Empowerment Act 53 of 2003.[35] No piece of procurement legislation can provide for or attempt to achieve all the identified objectives, since the pursuit of one of the objectives may militate against the achievement of another objective. For instance, the pursuit of best value for money may be at the expense of customer satisfaction.[36] Of the above identified nine objectives, four (competition, integrity, transparency and value for money) appear to be widely accepted as the overarching objectives of procurement regulation.[37] As will be seen in chapter 4, the procurement regulatory objectives of Nigeria and also South Africa include those four.

It should be noted however that a statement of objectives of procurement regulation is to provide guidance in the interpretation and application of the law. Such a statement of objectives generally does not itself create substantive rights or obligations for procuring entities or for bidders.[38]

Most public procurement legislation of state and national governments specify the objectives that they seek to achieve or the guiding principles for public procurement.[39] This development is partly as a result of the example set by the UNCITRAL Model Law.[40] Procurement legislative texts of 29 countries, including Nigeria, are reported to be based on or

[35] See P Bolton & G Quinot "Social Policies in Procurement and the Government Procurement Agreement: a Perspective from South Africa" in S Arrowsmith & R Anderson (eds) *The WTO Regime on Government Procurement: Recent Developments and Challenges Ahead* (2011) 459. The dimension of this South African policy that may relate to bidder remedies is further examined in chapter 4.

[36] See Schooner (2002) *PPLR* 108; W Kovacic "Procurement Reform and the Choice of Forum in Bid Protest Disputes" (1995) 9 *Admin.L.J. Am.U.* 461 486-487; R C Marshall, M J Muerer & J-F Richard "The Private Attorney General Meets Public Contract Law: Procurement Oversight by Protest" (1991) 20 *Hofstra L. Rev* 1 7-8.

[37] See Schooner "Desiderata" (2002) *PPLR* 104; Arrowsmith *Public and Utilities Procurement* ch 3. The UNCITRAL Model Law provides for these four objectives. It also provides for the promotion of international trade as an objective; however, the objective is seldom adopted by countries, except for countries involved in trade agreements, such as EU and North American Free Trade Agreement (NAFTA) countries.

[38] Guide to Enactment of the UNCITRAL Model Law on Public Procurement, pt II, para 1, 27.

[39] For example: s 26 of Botswana Public Procurement Act; s 2 of Ghana Public Procurement Act; s 3 of Kenya Public Procurement Act, s 47 of Tanzania Public Procurement Act, ss 43-49 of Uganda Public Procurement Act, s 4 of Zimbabwe Public Procurement Act. See also art 3 of the Government Procurement Law of the People's Republic of China, art 7 of Poland Public Procurement Act 2004 (as amended); and, s 1.102 of the United States Federal Acquisition Regulation 48 CFR.

[40] UNCITRAL Model Law on Procurement of Goods, Construction and Service 1994 ("UNCITRAL Model Law 1994); and, UNCITRAL Model Law on Public Procurement 2011 ("UNCITRAL Model Law 2011"). See preamble to the UNCITRAL Model Laws.

largely inspired by the 1994 Model Law.[41] The South African Constitution[42] and Nigerian PPA contain the objectives of procurement regulation of the respective countries.[43] A bidder remedies forum may refer to these objectives in determining the form and extent of remedies to grant towards enforcing compliance with the law.[44] Equally, bidder challenge, as a procurement enforcement mechanism, contributes in ensuring the achievement of various objectives of government procurement policy and regulations.[45] How the mechanism achieves enforcement of procurement regulation is discussed in section 2 3 2 2 below.

2 2 4 Need to enforce public procurement regulations

The discussion above revolved round the assumption that enforcement is indispensable to the operation of law. However, that assumption is controversial in jurisprudence.[46] The assumption is rejected by some legal theorists,[47] and defended by many others.[48] Some others reject it in one sense and defend it in another.[49] The assumption is usually rejected on the grounds that it is *possible in special circumstances* for law to operate without provision for enforcement.[50] While the core of the argument in defence of the assumption is that without enforcement a law will lack validity or sufficiency.[51] The argument on the middle ground is that enforcement is necessary in applying law to practical affairs, but that enforcement is not strictly necessary for the existence of law.[52] A middle ground approach is adopted in the current study. It is the view here that on one hand, a legal regime may be operative even where the right or power to enforce

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[41] UNCITRAL "Status" (2017) *UNCITRAL* <http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html> (accessed 17/09/2017). Apart from Nigeria, 10 other African countries are also included; South Africa is not among those.

[42] Constitution of the Republic of South Africa, 1996.

[43] These objectives are discussed in chapter 4.

[44] See Pachnou (2000) *PPLR* 63-64 where the author analysed the influence that the objectives of the EU Remedies Directives may exert on a review forum in applying the principle of effectiveness.

[45] X Zhang "Supplier Review as a Mechanism for Securing Compliance with Government Public Procurement Rules: a Critical Perspective" (2007) 16 *PPLR* 325 327; Marshall *et al* "Procurement Oversight by Protest" (1991) *Hofstra Law Review* 2-3.

[46] Kleinfeld (2011) *Yale L J Online* 293.

[47] Raz *Reason and Norms* 158; Shapiro *Legality* 169.

[48] J Finnis *Natural Law and Natural Rights* 2 ed (2011) 260-64 266-70; Dworkin *Law's Empire* 93; Kelsen *Law and State* 21; Weber *Economy and Society* 34.

[49] A Hamilton *The Federalist No. 15* C Rossiter (ed) (1961) 110; H L A Hart *The Concept of Law* 2 ed (1994) 27-33; L Fuller *The Morality of Law* (1964) 108-10; Kleinfeld (2011) *Yale L J Online* 306-311.

[50] Raz *Reason and Norms* 158

[51] Kelsen *General Theory of Law* 39-42

[52] Fuller *Morality of Law* 108-10; Kleinfeld (2011) *Yale L J Online* 306-311.

it is unavailable or excluded; but on the other hand, enforcement is necessary for a legal regime to be effective. An illustration of the fact that law can operate even where its enforcement is excluded is chapter 2 of the Constitution of Nigeria.[53] The chapter stipulates the fundamental objectives and directive principles of Nigeria's state policy. However, section 6(6)(c) of the Constitution provides that the question of non-compliance with the provisions of chapter 2 shall not be entertained by the courts for the purpose of enforcing them. Therefore, chapter 2 provisions are non-justiciable. In other words, the provisions are intended to be and are to an extent followed,[54] as guiding principles for governmental and private decisions, policies and actions;[55] but generally, cannot be enforced if breached.[56] The non-justiciable nature of chapter 2 provisions lead to non-compliance with them in many regards.[57]

There are various procurement enforcement mechanisms,[58] however, the concept of bidder remedies appears to have received the most attention. It has been described as the most important form of redress for breach of procurement rules.[59] Although the postulation was made in the context of enforcing EU procurement regime, it is arguably true for other procurement regimes. Many countries around the world,[60] including African countries,[61] have

[53] Constitution of the Federal Republic of Nigeria 1999 (as amended).

[54] For example, the chapter informed the enactment of the Corrupt Practices and other Related Offences Act No 6 of 2003, to abolish all corrupt practices and abuse of power, as declared under the chapter, in section 15(5). See *Attorney General of Ondo State v Attorney General of the Federation* (2002) 9 NWLR (Pt.772) 222.

[55] Section 13, under chapter 2 of the Constitution, provides: "It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this Constitution."

[56] There are however exceptions to this rule, which include: (1) where the legislature makes a law to promote and enforce chapter 2 provisions; (2) where a provision(s) of the Constitution outside chapter 2 stipulate(s) that a provision or principle under chapter 2 shall be observed or applied in carrying out an activity prescribed by the former provision(s). See *Attorney General of Ondo State v Attorney General of the Federation* (2002) 9 NWLR (Pt.772) 222; item 60 of the Exclusive Legislative List, 2nd schedule to the Nigerian Constitution.

[57] See Juriscope *Explaining the 1999 Constitution with Decided Cases* 39.

[58] Discussed in 2 5 below.

[59] Arrowsmith (1992) *PPLR* 93; Pachnou (2000) *PPLR* 55.

[60] The system in the United States of America (popularly referred to as "bid protest system") has been in operation since the 1920s, with the establishment of the General Accounting Office ("GAO"). This appears to be one of the oldest legislative establishments of bidder remedies system. See D I Gordon "In the Beginning: the Earliest Bid Protests Filed with the US General Accounting Office" (2004) 5 *PPLR* 147 147-164.

[61] Some of which are: Botswana (by virtue of Botswana Public Procurement Act, ss 53, 95-109); Ethiopia (by virtue of Ethiopia Federal Government Procurement and Property Administration Proclamation No. 649/2009, 15(7), chs 13 & 14); Ghana (by virtue of Ghana Public Procurement Act (as amended) ss 78-82); Kenya (Public Procurement Act ss 167-175); Nigeria (by virtue of Nigeria Public Procurement Act s 54); Rwanda (by virtue of Rwanda Public Procurement Law No 12/2007 of 27/03/2007 ch IV); South Africa (by virtue of reg.16A9.3 of the Treasury Regulations under the Public Finance Management Act 1 of 1999, reg.49 (read with reg.50) of the Municipal Supply Chain Management Regulations under the Municipal Finance Management Act 56 of 2003, Local Government: Municipal Systems Act 32 of 2000); Tanzania (by virtue of Tanzania Public Procurement

adopted systems of bidder remedies. It is likewise provided for in many international legislative texts on government procurement, which include: the UNCITRAL Model Law on Public Procurement,[62] the World Trade Organisation ("WTO")'s Agreement on Government Procurement ("GPA") 2014,[63] the EU Remedies Directives[64] and North American Free Trade Agreement (NAFTA).[65] Also a wealth of academic resources exists on the concept and systems of bidder remedies;[66] although as noted in chapter 1, African systems have not received sufficient academic attention.

A legal regime such as a public procurement regulation necessarily requires enforcement to make it efficacious, for various reasons discussed below.

2 2 4 1 Preventing abuse

The nature of procurement creates opportunity for abuse; and where abuse occurs, the potential consequential losses could be significant, considering that procurement spending may represent 10-20 per cent of gross domestic product ("GDP") and up to 50 per cent or even more

Actpt IX); Uganda (by virtue of Uganda Public Procurement Act pt VII); and Zimbabwe (by virtue of Zimbabwe Public Procurement Act part X). For a broad comparative perspective on the supplier remedies system in some of the aforementioned countries see Quinot "Supplier Remedies" in *Public Procurement Regulation* 308-335. For a broad perspective on the bidder remedies systems of Kenya and South Africa respectively see K T Udeh "A Critical Appraisal of Kenya's Supplier Remedies System in the Light of International Standards" (2013) 5 *PPLR* 183; and, Quinot (2011) *PPLR 195*.

[62] Chapter VIII.

[63] Article XX. For an analysis of the bidder remedies system under the GPA see S Arrowsmith *Government Procurement in the WTO* (2003) ch14; S Arrowsmith "The Character and Role of National Challenge Procedures under the Government Procurement Agreement" (2002) 4 *PPLR*. 235; M Footer "Remedies under the New GATT Agreement on Government Procurement" (1995) 4 *PPLR* 80; J Dalby "Remedies for Infringement of the Government Procurement Agreement" in A Tyrrell & B Bedford (eds) *Public Procurement in Europe: Enforcement and Remedies* (1997) ch14.

[64] These are Directive 89/665/EEC (the Remedies Directive), that provides remedies for enforcing the Public-Sector Directives; and Directive 92/13/EEC (the Utilities Remedies Directive), that provides remedies for enforcing the Utilities Directive. These two Remedies Directives "are designed to help ensure that government procurement of member countries carried out in contravention of the EU procurement rules will be remedied through review procedures. The Remedies Directives were in November 2007 amended by Directive 2007/66/EC (new Remedies Directive); and further by Directive 2014/23/EU (Concessions Directives), arts 46 & 47. For a discussion on reforms introduced in the new Directive, see R Williams "A New Remedies Directive for the European Community" (2008) 17 *PPLR* NA19; J Golding & P Henty "The New Remedies Directive of the EC: Standstill and Ineffectiveness" (2008) 17 *PPLR* 146; P Trepte "Public Procurement in the EU: A Practitioner's Guide" 2 ed (2007) 590-600. See also R Craven "The EU's 2014 Concessions Directive" (2014) 4 *PPLR* 188.

[65]Chapter 10, Section C (Art 1017). For a discussion on the provisions on government procurement, especially the article concerning bid protest, see further S Greenwold "The Government Procurement Chapter of The North American Free Trade Agreement" (1994) 4 *PPLR* 129; E A Troff "The United States Agency-level Bid Protest Mechanism: A Model for Bid Challenge Procedures in Developing Nations" (2005) 57 *AFL Rev* 113 134-37.

[66] See EU-Asia Link *Bibliography on Public Procurement Law and Regulation* (2012) 43-44 and other relevant literature referred to in this work.

of total government spending.[67] The United States ("US") massive procurement spending generally underscores this point- federal procurement totals between $350 billion to above $500 billion annually,[68] while procurement spending across the tiers of government is around 70% of total US public sector spending.[69] South Africa's public procurement market is estimated to account for approximately 21.77 per cent of the country's GDP.[70] Nigeria's procurement spending falls within the range of 10-20 per cent of the country's GDP,[71] as extrapolated by UNCITRAL.[72] Lack of integrity or corruption is a major concern in public procurement, especially in Africa.[73] From a legal perspective, one of the key ways to address concerns regarding integrity is to develop an effective enforcement mechanism, particularly a bidder remedies regime.[74] A bidder remedies regime helps to expose abuses of the public

[67] UNCITRAL "UNCITRAL Model Law on Public Procurement (2011)" (2017) *UNCITRAL* <http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html> (accessed 17-09-2017). Most Country Procurement Assessment Reviews on various African countries conducted by the World Bank indicate that huge losses were caused by corruption in the public procurement systems reviewed.

[68] US GAO *Strategic Sourcing: Improved and Expanded Use Could Save Billions in Annual Procurement Costs* GAO-12-919 2; The Whitehouse "Turning the Tide on Contract Spending" (04-02-2011) *Office of Management & Budget* <http://www.whitehouse.gov/blog/2011/02/04/turning-tide-contract-spending> (accessed 27-12-2014); International Corporate Accountability Roundtable (ICAR), R Stumberg, A Ramasastry & M Roggensack *Turning a Blind Eye? Respecting Human Rights in Government Purchasing* (2014) 1.

[69] C Cram "$3.5tn Global Spend on Local Procurement 'Woefully' Mismanaged" (22-10-2012) *The Guardian* <http://www.theguardian.com/local-government-network/2012/oct/22/colin-cram-local-government-global-procurement> (accessed 17-09-2017).

[70] D Audet "Government Procurement: A synthesis Report" (2002) 2 *OECD Journal on Budgeting* 1 180; see also P Bolton "Regulatory Framework for Public Procurement in South Africa" in G Quinot & S Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) 178 181

[71] Nigeria estimated public procurement spending (capital expenditure) for 2017 was N 2,177,866,775,867: Appropriation Act 2017 schedule part D; Budget Office of the Federation "2017 Appropriation Act" (29-06-2017) *Budget Office of the Federation* <http://www.budgetoffice.gov.ng/index.php/resources/internal-resources/executive-order/2017-appropriation-act> (accessed 31-01-2018).

[72] UNCITRAL "UNCITRAL Model Law on Public Procurement (2011)" *UNCITRAL* http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html (accessed 17-09-2017).

[73] G Quinot "A Comparative Perspective on Supplier Remedies in African Public Procurement Systems" in G Quinot & S Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) 308 308; S Williams-Elegbe "A Perspective on Corruption and Public Procurement in Africa" in G Quinot & S Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) 336 345. See also Udeh & Ahmadu "Nigeria" in *Public Procurement Regulation* 144; W Odhiambo & P Kamau "Public Procurement: Lessons from Kenya, Tanzania and Uganda" 208 (2003) *OECD Development Centre: Working Paper* 36; OECD *Enhancing Integrity in Public Procurement: OECD Joint Learning Study on Morocco* (2008); T Asare, A Kane, F Leautier and S Majoni "Trends in Public Procurement in Africa: Opportunities and Challenges of Capacity Building Interventions" presentation at the III Global Conference on Electronic Government Procurement (2009); R Hunja "Obstacles to Public Procurement Reforms in Developing Countries" in S Arrowsmith and M Trybus (eds) *Public Procurement: the Continuing Revolution* (2003) 13-22.

[74] Quinot "Supplier Remedies" in *Public Procurement Regulation* 308; Williams-Elegbe "Corruption and Public Procurement" in *Public Procurement Regulation* 351. See also Gordon (2006) *Pub. Cont L J* 428 430-445.

procurement regime and acts as a redress against abuses, and deters future potential abuses.[75] In recognition of this, article 9 (1) (d) of the United Nations Convention against Corruption ("UNCAC") requires procurement systems to include an effective challenge mechanism, to ensure legal recourse and remedies in the event that the procurement rules or procedures are breached. Eliminating or redressing abuses, which enforcement engenders, ensures that corrupt practices do not interfere with the transparent and open conduct of procurement.[76]

2 2 4 2 Enhancing public confidence

Public procurement legislation regulates competitors (bidders) that seek to maximize their economic self-interest. It is therefore necessary that all parties involved be *compelled* to play by the rules. In the absence of enforcement to compel compliance with the rules, competitors may engage in improper conduct to outsmart one another and the system, in a bid to win contracts. Examples of such improper conduct include: collusion, price-fixing, and maintenance of cartels.[77] Where such improper conduct is allowed or perceived, it lowers public confidence and creates a barrier to participation of bidders in the procurement market.[78] This barrier in turn lowers the opportunity of deriving value for money which competition affords. Public confidence is enhanced where enforcement of the rules is clearly visible, and transgressions appropriately punished.[79] Potential bidders will hardly trust that the procurement rules shall be followed if the regulatory regime does not provide for enforcement. They may also not trust that the regime will protect bidders who suffer damage caused by breach of the regulations. All of this may deter bidders from participating in public bids, thus lowering competition.

2 2 4 3 Protecting bidders' rights

Public procurement involves decision-taking on behalf of government, which directly affects the economic and legal rights of bidders. For example, a bidder possesses the right to participate in a procurement exercise if it is eligible. Bids are to be evaluated using only criteria contained

[75] Zhang (2007) *PPLR* 327

[76] L Ferola "Anti-Bribery Measures in the European Union: A Comparison with the Italian Legal Order" (2000) 28 *I J L I* 515; S Williams-Elegbe *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification Measures* (2012) 42.

[77] See Williams-Elegbe "Corruption and Public Procurement" in P*ublic Procurement Regulation* 347; R Klitgaard, *Controlling Corruption* (1988) ch 6.

[78] See Gordon (2006) *Pub Cont L J* 427 431 445

[79] Guide to Enactment of the UNCITRAL Model Law 2012, pt II, para 30, 33.

in the solicitation documents or the procurement regulation as of right. Legal rights import correlative obligations, that is, they contain or imply commands addressed to identifiable individuals to refrain from conduct that would violate those rights.[80] Consequently, a sufficiently proven violation justifies enforcement to protect rights.[81]

2 2 4 4 Engendering transparency and control

Transparency, which is at the core of public procurement regulations, demands that the procurement procedure or the decision or action involved shall be subject to scrutiny and liable to challenge. According to the Guide to Enactment of the UNCITRAL Model Law 2012 ("Guide to Enactment"),[82] one of the main elements of transparency in procurement is the existence of mechanisms to monitor compliance with procurement rules and enforce them where necessary. The fact that public procurement process involves exercise of discretion by government officials makes oversight imperative, as the incentives of the officials are often poorly aligned with public interest.[83] Enforcement or oversight is necessary to control the exercise of discretion.

2 3 Concept and features of bidder remedies

The concept of bidder remedies, its essential features, and the factors that contribute to its importance and drawbacks as a procurement enforcement mechanism are discussed under this section. No attempt is made to particularise the discussion to Nigeria and South Africa, except where the contexts demands. It is intended to provide an understanding of general issues relating to a bidder remedies system. The detailed and particularised analysis of the issues as obtained in Nigerian and South African systems is undertaken in the subsequent chapters.

2 3 1 Concept of bidder remedies

Bidder remedies refer to the right provided or recognized by law by which a person that is interested in being awarded a government contract may challenge and seek redress against a decision, action or inaction of a public procuring entity, which is perceived to be in breach of

[80] S M Schneebaum "Ubi Jus, Ibi Remedium" (2009) 9 *Human Rights & Human Welfare* 103 103.
[81] As captured by the Latin maxim: *Ubi jus ibi remedium* ("where there is a right there is a remedy"). See *Ashby v White* (1703) 14 St Tr 695, 92 ER 126, per Lord Chief Justice Holt.
[82] Part II, para 32 at 34.
[83] Marshall *et al* (1991) *Hofstra Law Review* 3.

applicable public procurement rules.[84] The person interested in being awarded a government contract is here referred to as a bidder, except as otherwise stated. A cursory examination of the above definition gives the impression that it does not cover or foresee a circumstance where it is the breach by a bidder that gives rise to the review. However, on further analysis, it would be realized that where a bidder breaches a procurement rule in the course of procurement exercise, it will give rise to a cause of action only if the procuring entity permits the breach. For instance, where a bidder submits a bid after the deadline for bid submission, it will become a matter fit for review only if the procuring entity does not reject the bid. This is because the procuring entity acts as an umpire in the competition for a government procurement contract. Thus, it bears the responsibility of adhering to and ensuring compliance with the procurement law. However, the bidder whose non-compliant action or omission was permitted by the procuring entity may also be joined as a defendant in the challenge proceeding. Ultimately, it is the procuring entity's decision, action or omission that is always in issue, as the definition above indicates. Consequently, the procuring entity involved is always the main defendant in the review proceedings.

Another question that may arise from the definition above is whether it is only bidders that can exercise the right to institute a challenge proceeding? This question is addressed in detail below.[85] But it suffices at this juncture to state that, as the name and definition implies, the right to bidder remedies is primarily exercisable by bidders.[86] As the Guide to Enactment[87] puts it, bidders "have a natural interest in monitoring procuring entities' compliance with the provisions of the … law." In *Scanwell Labs Inc v Shaffer*,[88] the court while noting the paramount role of an aggrieved bidder in initiating a challenge proceeding, referred to it as "private attorney general".[89]

Although "bidder remedies" is used here to refer to a mechanism or bidders' right to challenge procurement decisions;[90] nevertheless, in a narrow sense, bidder remedies may be used to refer to the actual heads of claims (remedies) available in law for bidders that initiate a

[84] For other definition of bidder remedies, see Guide to Enactment ch VIII para 1, 228; Zhang (2007) *PPLR 325;* Gordon (2006) *Pub. Cont. L.J.* 428.
[85] 2 3 2 3.
[86] See F J Lees "Resolving Differences: Protests and Disputes" (2002) 2 *PPLR* 138 138.
[87] Chapter VIII, para 2, 228.
[88] 424 F.2d 859, 864 (D.C. Cir. 1970) 867.
[89] Also described as such generally in Marshall *et al* (1991) *Hofstra Law Review*; see also Lees (2002) *PPLR* n 3.
[90] Used as such in Quinot "Supplier Remedies" in *Public Procurement Regulation* 308.

challenge.[91] In other words, it may be used to refer to the decision(s) or order(s) that may be made by the review authority or forum in resolving the review case. It may even be used to refer to other remedies for breach of procurement rules provided by law, which bidders can explore instead of or in addition to challenge proceedings. Such secondary remedies include a procurement regulatory agency's power to investigate breaches and take punitive or corrective measures.[92]

A bidder remedies system may involve merely an opportunity for an aggrieved bidder to apply to the procuring entity to *reconsider* its action or decision and reply to the bidder.[93] It may also be in the form of instituting a legal proceeding before an external (usually independent) administrative body or a court or tribunal, which has the power to grant corrective or punitive remedies against the alleged breach of procurement rules.[94] Where bidder remedies involve such formal adjudicatory proceedings, it is often referred to as challenge proceedings.[95]

Apart from the various terms used in referring to bidder remedies, presented in chapter 1, different nomenclature is used (in legislation and practice) to denote the application or process of the review. Similar to what is obtained in Nigeria, "complaint" is used in South Africa to refer to an application for administrative review of a government procurement decision or action. The use of the term is derived from several pieces of legislation that make up public procurement law of South Africa.[96] Another term used in South Africa to refer to a review application, albeit seldom, is "objection".[97] In addition, "appeal" is used to refer to a case for administrative scrutiny of procurement decision or action, especially where it involves taking the matter before an official or tribunal within the same administrative hierarchy as the initial decision maker.[98] The term "appeal" used in the above context is also a derivative of

[91] See Arrowsmith *Public and Utilities Procurement* (2005) ch 21. The focus there was largely not on bidder remedies as a *concept of procurement enforcement* but on remedies as *heads of claims* available to aggrieved bidders. Although the passage uses the term *legal remedies* or *remedies* not *bidder remedies,* it still illustrates the point. See also Arrowsmith (1992) *PPLR* 92-118.

[92]See Arrowsmith *Public and Utilities Procurement* (2005) ch 21 1444-1464.

[93] Such as provided under UNCITRAL Model Law, art 66.

[94] General issues relating to forums for entertaining bidder remedies are considered in 2 3 2 3 below.

[95] As used in the UNCITRAL Model Law, ch VIII. The GPA, art XX, has similar term: "challenge procedure".

[96] Such as Treasury Regulations, reg.16A9.3; Municipal Supply Chain Management Regulations, regs 49 and 50; and Promotion of Administrative Justice Act 2000 ("PAJA"), s 10(2)(a)(ii).

[97] This is derived from regs 49 and 50 of Municipal Supply Chain Management Regulations.

[98] Often the official or tribunal is more senior than the initial decision-maker, either administratively or politically. See *Reed v Master of the High Court of SA* [2005] 2 ALL SA 429 (E) op 436A.

relevant South African legislation.[99] However, South African courts have different opinions on whether "appeal" as contained in section 62 of Local Government: Municipal Systems Act 2000 ("Systems Act"),[100] correctly refers to an internal review right of an aggrieved bidder. The High Court, per Binns-Ward J, in *Loghdey v City of Cape Town*[101] opined that "objections or complaints", as stated in the Municipal Supply Chain Management Regulations,[102] are what properly refer to the review right of unsuccessful bidders. Conversely, that "appeals" in section 62 of Systems Act does not refer to such right and generally cannot be relied on by an unsuccessful bidder to pursue redress against a government contract award.[103] Prior to that, it had been accepted by the South African courts that "appeals" as provided under section 62 of Systems Act, inter alia, refers to bidders' right of review.[104] The terminology above used in the legislation appears to have played a part in the distinction made by the High Court.

Considering the above decision in *Loghdey v City of Cape Town,* the use of such terms in procurement legislation may be relevant in ascertaining legislative intent as it relates to bidder remedies process. It may, for instance, be apposite in determining what procedures (whether formal or informal) would best serve the substance of a review case. This is especially so where the relevant legislation is silent on the procedure or some aspects of procedure to be followed in conducting the review. As held in *Salomon v Salomon*:[105]

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[99] Such as s. 62(1) of the Local Government: Municipal Systems Act 2000 ("Systems Act"); and s. 10(2)(a)(ii) of PAJA.

[100] Section 62(1) states: "A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may *appeal* against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision." (Emphasis added).

[101] 20/1/2010 case no 100/09 para 29 n 19.

[102] Regulation 49 (read with reg.50) states: "Supply chain management policy … must allow persons aggrieved by decisions or actions taken … in the implementation of its supply chain management system, to lodge within 14 days of the decision or action a written *objection* or *complaint* to the municipality or municipal entity against the decision or action." (Emphasis added).

[103] The court referred to *Reader v Ikin* 2008 (2) SA 582 (C); and *Municipality of the City of Cape Town v Reader* [2008] ZASCA 130, 2009 (1) SA 555 (SCA); where it was held that s 62 of the Systems Act is nothing more than a codification of the limited circumstances in which a decision-maker can, at common law, withdraw or alter its own decision without infringing the doctrine of *functus officio.*

[104] See *Jicama 17 (Pty) Ltd v West Coast District Municipality* 2006 (1) SA 116 (C); *Loghdey v Advanced Parking Solutions* CC 2009 (5) SA 595 (C); *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008 (4) SA 346 (T).

[105] [1897] AC 22 38, as quoted in BA Garner (ed) *Black's Law Dictionary* 9 ed (2009) 983.

> "In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."

2 3 2 Essential components of bidder remedies

This section, pursuant to the aim and context expressed in 2 3 above, analyses key aspects of bidder remedies and their related theories under the following subheading: scope of bidder remedies, objectives and effects of bidder remedies and components of a bidder remedies system.

2 3 2 1 Scope of bidder remedies

A bidder remedies system is generally empowered to review pre-bid, bidding and award decisions of a procuring entity. Examples of such decisions include: inclusion of an inappropriate technical specification in a solicitation document (pre-bid); acceptance of late bid (bidding); and, award to a bidder who did not submit the lowest evaluated responsive bid (award). When a contract has been concluded, a bidder may or may not be permitted to initiate a review, depending on the jurisdiction.[106] In jurisdictions where reviews of concluded contracts are not permitted, a period of mandatory standstill between notice of award and conclusion of contract may be stipulated to restrain the procuring entity from rushing to sign the contract.[107] Another safeguard in the circumstances is that procurement legislation may define concluded contracts to mean contracts signed in accordance with the provisions of the applicable legislation. In that case, if a contract is signed contrary to statutory provisions, it will be regarded as invalid or having not been concluded.[108] In jurisdictions where concluded contracts are reviewable, there is usually a time limit within which to bring a complaint against such concluded contracts. This is to safeguard against delaying smooth execution of the contract.

Bidder remedies and contract disputes resolution are related public procurement enforcement mechanisms, but they are clearly distinguishable as discussed below. It should be

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[106] What is obtainable in this regard in Nigeria and South Africa is analysed in chapter 5.

[107] See for example art 22 (2) of the UNCITRAL Model Law, and art 2a(2) of the EU's Directive 2007/66/EC.

[108] For example, Kenya Public Procurement Act s 167(4) is to the effect that it is only contracts concluded *in accordance with* s 135 of the Act that shall not be reviewable. Section 135 provides that a contract shall be entered into with the successful bidder based on the tender documents, and that a standstill period of at least 14 days after notification of award shall elapse before the contract is signed. For an analysis of these provisions in the 2005 Act, see Udeh (2013) *PPLR* 190-192.

noted that this work will generally not treat contract dispute resolution beyond analysing its relationship with bidder remedies; as focus is on bidder remedies and virtually all textbooks on law of contract in both jurisdictions amply treat contract dispute resolution.

(i) Bidder remedies and contract dispute resolution: distinction

It is apposite to distinguish between a bidder remedies system and a contract dispute resolution system as it relates to a procuring entity. Contract disputes are disagreements or controversies, which arise between a contractor and the procuring entity during performance of the contract between the parties.[109] The two mechanisms differ as they relate to who may bring the action, the purpose of the action, the forum in which the action may be brought, the applicable law and regulation, procedures followed, and the relief available to the successful party.[110]

In bidder remedies, as seen above, the complainant against the procuring entity is an aggrieved or unsuccessful bidder; while in contract dispute the complainant is the contractor that won the procurement contract. The bidder's purpose for initiating bidder remedies is to compel a procuring entity to comply with the procurement rules or to get a remedy for breach of the rules. Conversely, a contract dispute is primarily initiated to compel a procuring entity to comply with the terms of contract or to get a remedy for breach of the terms. The forum for bidder remedies depends on the applicable law within a jurisdiction. The forum may be the procuring entity or its designated officer; an administrative review body; or (subsequently) an ordinary or administrative court. Contract disputes are usually entertained in the first instance by ordinary courts, where alternative dispute resolution (ADR) mechanisms, such as negotiation, fails. However, in some cases contract disputes could be brought before an administrative review body. This is not known to be obtainable in Nigeria and South Africa, but it is obtainable elsewhere. For instance, in the United States, a contractor whose contractual claim is rejected in whole or in part by the relevant procuring entity may elect to file an appeal against such decision with the procuring entity's Board of Contract Appeals.[111]

[109] Lees (2002) *PPLR* 142.

[110] 138.

[111] The Board of Contract Appeals is an independent, adjudicatory body established within the department or agency, staffed by a number of specially qualified administrative judges (e.g., the Armed Services Board of Contract Appeals, which is the largest of the agency boards).

A bidder remedies system is in most cases governed by public procurement legislation, and only in some cases by administrative law, contract and tort/delict.[112] In many common law jurisdictions, procurement decisions of public entities become reviewable on the grounds of administrative law principles only where there is a public law element[113] in the decision, or there is a statutory provision upon which one can predicate the review.[114] A contract dispute resolution is generally governed by the law of contract;[115] and the application of administrative law principles to contract disputes is rare and largely inconsistent. For example, while some decisions of South African courts are to the effect that the principles of administrative law apply to post-award or contract disputes, others are to the contrary.[116] The procedure adopted by each of the dispute resolution mechanisms depends on the law governing each of them and also the procedural rules of the forum. Relief available in bidder remedies are largely targeted at protecting the opportunity or right of the bidder to compete according to the rules and to win the contract award; or in some cases, to compensate it for the denial of that opportunity or right.

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[112] This is the case in South Africa and Nigeria, as would be discussed later. See Quinot *State Commercial Activity* 3-5; Quinot (2009) *TSAR* 436 439; Quinot (2011) *PPLR* 195. See also *Steenkamp NO v Provincial Tender Board* EC 2007 3 SA 121 (CC) para 21.

[113] Whether a public law element is present will depend partly on the nature of the decision; as stated in *R v Derbyshire CC ex parte Noble* 1990 ICR 808 819 (per Woolf LJ): "[T]he approach which the courts now adopt … is to look at the subject-matter of the decision which it is suggested should be subject to judicial review and by looking at the subject-matter then come to a decision as to whether judicial review is appropriate". See *R v Lord Chancellor ex parte Hibbit and Saunders* 1993 COD 326; *R (on the application of Gamesa Energy UK Limited) v The National Assembly for Wales* 2006 EWHC 2167 QBD (Admin) para 58-61; *R (on the application of Menai Collect Ltd) v Department of Constitutional Affairs* 2006 EWHC 724 (Admin). See also Quinot (2009) *TSAR* 438-439.

[114] Arrowsmith (1990) *LQR* 277; Quinot (2009) *TSAR* 438-439; S Bailey "Judicial Review of Contracting Decisions" (2007) *Public Law* 444 448; C Hoexter "Contracts in Administrative Law: Life after Formalism?" (2004) *SALJ* 595; H Woolf, J Jowell & A Le Sueur *De Smith's Judicial Review* 6 ed (2007) 140-143.

[115] In the form of legislation and general principles of contract derived from case laws.

[116] In *Government of the RSA v Thabiso Chemicals* 2008 ZASCA 112 para 18 the court held, per Brand JA, thus "I do not believe that the principles of administrative law have any role to play in the outcome of the dispute. After the tender had been awarded, the relationship between the parties in this case was governed by the principles of contract law". Contrast with the decision in *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) para 21: "An organ of state which is empowered by statute to contract *is obliged to exercise its contractual rights with due regard to public duties of fairness*. … Even when it is clear that an organ of state has in fact entered into a contract, it may still be difficult, depending on the circumstances, to determine where the line is to be drawn between, on the one hand, its public duties of fairness and on the other its contractual obligations, or indeed the extent to which the two may overlap, if at all." (Emphasis added). See also *Cape Metropolitan Council v Metro Inspection Services CC* 2001 (3) SA 1013 (SCA) para 18; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) paras 11 and 12; *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA); *Zimport Water Service CC v Minister of Public Works, Director-General Department of Public Works v Chairperson Bid Adjudication Committee* (37169/06 & 41073/06) [2008] ZAGPHC 82. See further G Quinot "Public procurement" (2008) 3 *Juta's Quaterly Review of South African Law* para 2.1; and, Quinot (2011) *PPLR* 201.

Relief available in contract dispute are targeted at protecting the right of the contractor to perform the contract in accordance with the terms, and to make gains according to the terms of contract. In fact, there are remedies, such as specific performance, which are generally only obtainable from contract disputes.[117] However, injunctive relief may be available in both mechanisms to prevent unlawful actions or breach of contract.[118] A bidder remedies system does not extend to resolving breaches of concluded contracts; that is within the remit of the contract dispute resolution system.

There may be a mixture of bidder remedies and contract dispute in a particular review proceeding, particularly in jurisdictions where concluded contracts are reviewable. For instance, in South Africa and Nigeria, a bidder can apply to a review authority to set aside a concluded contract; notwithstanding that a contractor had begun to execute the contract and has incurred expenses.[119] In such cases, the contractor may defend the validity of the procuring entity's decision to award and conclude the contract with it; and may alternatively claim from the procuring entity for reimbursement of contract expenses or for part-payment of the contract sum on *quantum meruit* basis.[120] Defending the validity of the contract is within the ambit of bidder remedies; claiming for expenses and contract sum is an aspect of contract dispute. However, instead of mixing both claims, the contractor may choose to only defend the contract validity and if the contract is upturned, it may then sue in contract to recover contract expenses or part of contract sum. It can also sue for damages for delict or tort of negligence, on the ground that the contract was set aside owing to the wrongful or negligent procurement decision or action of the procuring authority.[121]

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[117] Specific performance is "the rendering, as nearly as practicable, of a promised performance through a judgment or decree" or it is "a court-ordered remedy that requires precise fulfilment of a legal or contractual obligation when monetary damages are inappropriate or inadequate". See Garner *Black's Law Dictionary* 1529. See also *LSDPC v Nigerian Land and Sea Foods Ltd* (1992) 5 NWLR (Pt 244) 653; and, *Mpange v Sithole* (07/7063) [2007] ZAGPHC 202.

[118] See *Warner Bros Pictures Inc v Nelson* [1936] 1 K.B 209; *M v Home Office* [1994] 1 A.C. 377. See also Arrowsmith *Public and Utilities Procurement* 1364; Pachnou (2000) *PPLR* 63. In certain cases, it may be deemed that there is an implied contract governing the contract award procedure. See *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons* (1999) 67 Cons. L.R 1; (2000) 2 L.G.L.R. 372, QBD; also Arrowsmith *Public and Utilities Procurement* 1385.

[119] See *Steenkamp NO v Provincial Tender Board*, EC 2007 3 SA 121 (CC); *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999 (1) SA 324. The Nigeria administrative review forum has powers to cancel concluded contracts and has exercised these powers in a number of unreported cases (on file with author).

[120] *Quantum meruit* literally means "as much as it has earned". See *Bernardy v Harding* (1855) 8 Ex. 822; *Warner & Warner v F.H.A* [1993] 5 NWLR (Pt 298) 148 176; and *Ruslyn Mining & Plant Hire v Alexkor* (91710) [2011] ZASCA 218.

[121] As was claimed, albeit unsuccessfully, in *Steenkamp NO v Provincial Tender Board*, EC 2007 3 SA 121 (CC).

(ii) Relevance of distinguishing the systems

Distinguishing bidder remedies from contract dispute is relevant in determining whether *res judicata* will apply in a fresh suit to claim remedies by a contractor whose contract has been set aside through bidder remedies brought by way of a judicial review. The plea of *res judicata* prohibits the court from enquiring into a matter already adjudicated upon. It ousts the jurisdiction of the court.[122] The basis of the plea is that there must, in the public interest, be an end to litigation.[123] Relevant to the plea is also the well-established principle of law, which applies to both civil and criminal cases: that no one ought to be sued twice on the same ground or for the same cause of action.[124] The invalidated procurement procedure or the voided contract is the cause of action in the bidder remedies proceedings, of which the contractor was a party. The contractor's fresh litigation to claim remedies in contract would have been arguably caught up by *res judicata* if not for the fact that bidder remedies proceeding (even if in the same court) relates to a different issue and is also a distinct specie of legal action from the contract dispute. Thus, in *Steenkamp NO v Provincial Tender Board*,[125] the contractor that won and signed a contract was a party in a bidder remedies proceeding[126] brought against the procuring entity by way of judicial review before the High Court of South Africa, which eventually set aside the contract owing to irregularities in the bidding process. The court allowed the contractor to bring before it a fresh suit against the procuring entity for breach of the contract and for delict; since the earlier review case did not stand as *res judicata* against hearing the contractual and delictual claims.[127]

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[122] *Bassil v Honger* 14 W.A.C.A. 569 at 572. See *Odadhe v Okujani* (1973) 11 S.C. 343 353; *Ukaegbu v Ugoji* [1991] 6 NWLR (Pt 196) 127; and, *NASASA Cellular (Pty) Limited v South African Post Office Limited* (57471/07) [2010] ZAGPPHC 90; *Boshoff v Union Government* 1932 TPD 34 349; and, *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 635 (A).

[123] It is expressed in the Latin maxim: "*Interest Rei publicae ut sit finis litium*". See *Akanbi v Alao* (1989) 3 NWLR (Pt 108) 118 140; and, *PGP Body Corp Administration CC v The Trustees of the body Corporate Club Kerkira* (AR 403/11) [2012] ZAKZPHC 81.

[124] It is expressed in the latin maxim: *"nemo debet bis vexari, si constat curiae quod sit pro una et eadem causa"*. See *Chief Adomba v Odiese* (1990) 1NWLR (Pt 125) 165 178, 1 SCNJ 118; and *Oshoboja v Amuda* [2009] Vol 12 (Pt I) MJSC 96. See also *State v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC).

[125] EC 2007 3 SA 121 (CC).

[126] In *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999 (1) SA 324 (Ck HC).

[127] Even though the court entertained the matter, the claims however were not granted; and the appeals to the Supreme Court of Appeal and further to the South African Constitutional Court failed.

(iii) Bidder remedies and contract dispute resolution: similarities

However, there are similarities between a bidder remedies and contract dispute resolution mechanisms as they relate to public procurement. Both mechanisms help to maintain the objectives of transparency, fairness, competition, and integrity in the overall government procurement system.[128] In both mechanisms, a government or a public entity is always a party. Both mechanisms rely on evidence to make decisions. Bidder remedies and contract dispute cases are both civil proceedings, therefore claims by parties are proved on preponderance of evidence.[129] Thus, evidence adduced in proof of any claim made in both proceedings need not be proved beyond reasonable doubt; except where the complainant raises a criminal allegation, such as fraud.[130]

In determining who wins the case, the forum in both mechanisms will have regard to whether evidence is admissible, relevant, credible, conclusive or more probable than that adduced by the other party.[131] The review forums in both mechanisms normally give written decisions with reasons, in accordance with the doctrine of natural justice and procedural fairness, which demand that judicial or quasi-judicial decisions shall be with reason and made available to the parties in writing.[132] These written decisions serve as the basis for appeals to an appellate authority (where available), as precedent for subsequent proceedings, and as guidance to members of the public procurement community.

(iv) Conclusion

In bidder remedies proceedings, it is the decisions that the review forum has powers to give and the effect of the decisions (whether binding or advisory) that constitute remedies for an aggrieved bidder. These remedies are usually stipulated in the enabling legislation. Apart from

[128] Lees (2002) *PPLR* 142. Also, see generally, Schooner (2001) *Am U L Rev* 627; which discusses the importance of external monitoring of the procurement process by the contractor community through litigation.

[129] That is, evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; in other words, evidence which as a whole shows that the fact sought to be proven is more probable than not. See Garner *Black's Law Dictionary* 1301. See also *Akintola v Solano* [1986] ANLR 395; and, *Aegis Insurance Company Ltd v Consani NO* (6/95) [1996] ZASCA 66, 1996 (4) SA 1 (SCA), [1996] 3 All SA 547 (A).

[130] See *Nwobodo v Onoh* [1984] 1 SCNLR 1; *Nigerian Spannish Engineering Co Ltd v Ndukas Ezenduka* [2002] 28 WRN 146; *Davy v Jarret* (1877) 7 Ch. D 473 489 per Thesiger, J.

[131] See *Mogaji v Odofin* (1978) 4 S.C at 91; *Akanni v Odejide* (2004) All FWLR (Pt. 218) 827 at 858 paras. E-H, (2004) 9 NWLR (Pt. 879) 575; and *Aegis Insurance Company Ltd v Consani NO* (6/95) [1996] ZASCA 66; 1996 (4) SA 1 (SCA); [1996] 3 All SA 547 (A).

[132] Wade *Administrative Law* (1977) 757-58. See also Recommendations of Sir Frank's Committee on Constitution and Working of Administrative Tribunals in England (1955).

this, the forum may make decisions based on its inherent powers.[133] It is more effective where the decision of a review forum is binding on the parties and only subject to appeal within stipulated time. Elements that make a bidder remedies system effective are considered in section 2 4 below. The decisions that the review body is empowered to make may depend on the objectives which the bidder remedies system aims to achieve.[134]

2 3 2 2 Objectives and effects of bidder remedies

(i) The objectives

There are various purposes that a bidder remedies system may be set up to achieve. These may include: ensuring compliance with procurement rules by correcting identified breaches and deterring potential breaches; protecting the interest of bidders at risk of or adversely affected by breach of procurement rules;[135] fostering bidders' confidence in the public procurement system; and, maintaining the integrity of the system.[136] The objective(s) of a remedies system may be considered by a review forum in deciding which available remedy it will give to an aggrieved bidder.[137] Where the objective of the remedies system is primarily to uphold the procurement rules, the forum will be inclined towards granting remedies that prevent and correct breaches, such as interim measures and set-asides.[138] Where the protection of aggrieved

[133] Inherent powers doctrine is a principle that allows courts to deal with diverse matters over which they are thought to have intrinsic authority, such as making rules of procedures of the court. See Garner *Black's Law Dictionary* 853.

[134] S Arrowsmith "Enforcing the Public Procurement Rules: Legal Remedies in the Court of Justice and the National Courts" in S Arrowsmith (ed) *Remedies for Enforcing the Public Procurement Rules* (1993) 49; Arrowsmith (1992) *PPLR* 98.

[135] See Pachnou (2000) *PPLR* 63; Arrowsmith (1992) *PPLR* 98; Gordon (2006) *Pub. Cont. L.J* 430; Marshall *et al* (1991) *Hofstra Law Review* 6 n 17. See also Guide to Enactment, ch VIII, para 2, 228; para 10 230. The European Court of Justice had mentioned the objective of protecting bidders' right as an objective of the EU Remedies Directives in C-45/87R *Commission v Ireland (Dundalk)* [1987] E.C.R. 1369; C-194/88R *Commission v Italy (La Spezia)* [1988] E.C.R. 5647; C-272/91R *Commission v Italy (Lottomatica)* [1992] E.C.R. I-4367; C-3/88 *Commission v Italy (Re Data Processing)* [1989] E.C.R. 4035; C-87/94R *Commission v Belgium (Walloon Buses)* [1994] E.C.R. I-1395.

[136] Guide to Enactment, ch VIII, para 2, 228; Quinot "Supplier Remedies" in *Public Procurement Regulation* 308.

[137] As stated by the US General Services Administration Board of Contract Appeals, thus: "(T)he purpose of the protest process is to assure that in federal agency procurements, not only are vendors treated fairly, *but also- of greater importance in crafting relief*- that the agency ultimately makes an award against the bid or proposal that is most advantageous to the United States.": SMS Data Prods. Group, Inc. GSBCA No. 10864-P, 91-1 B.C.A. (CCH) 23 464, 117,718 (1990) (Emphasis added). See also Pachnou (2000) *PPLR* 63; Arrowsmith (1992) *PPLR* 98. See further GPA art XX (7) (a).

[138] Pachnou (2000) *PPLR* 63

bidder's rights is a primary objective it may tend towards awarding generous compensational remedies, such as damages.[139]

Granting redress to protect the rights of aggrieved bidders is critical to the sustenance of the remedies system, since it is the bidders that initiate the review proceedings. Notwithstanding that a procuring entity which wishes to nullify its wrong procurement decision may do so by applying to an administrative review body or a court,[140] such review process is rare and may not be deemed as a bidder review properly so called. The Guide to Enactment identified that a bidder remedies system helps to make procurement law to "an important degree self-policing and self-enforcing".[141] This is because it provides an avenue to litigate for bidders that have a natural interest in monitoring procuring entities' compliance with the procurement rules. In an attempt to protect their rights or to remedy the injury caused by breach of procurement rules, bidders act as "private attorney generals" to enforce compliance.[142] As noted by Marshall *et al*: [143]

> "The notion that private parties should be encouraged to litigate to advance public goals that coincide with their private interests has long been recognized in areas such as antitrust, securities law and derivative actions".

Where redress is adequate to motivate bidders to initiate a challenge, the risk of facing increased litigation may dissuade procuring entities from infringing the rules. On the other hand, the reduction of infringements owing to the deterrence effect of the enforcement regime will lead to the respect of bidders' rights under the law.[144] Thus, the objectives of enforcing compliance and protecting aggrieved bidders' rights are linked.

If a bidder does not commence a challenge, a review forum will not interfere with the procurement process. Ordinarily, a procurement process involves only the procuring entities

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[139] 63; J-M Fernández-Martín *The E.C. Public Procurement Rules: a Critical Analysis* (1996) 179-203.

[140] *Municipal Manager: Qaukeni Local Municipality v FV General Trading* [2009] 4 All SA 231 (SCA) 23: "a public body may not only be entitled but also duty bound to approach a court to set aside its own irregular" decisions. See *TBP Building & Civils v the East London Industrial Development Zone* [2009] JDR 0203 (ECG); *Casalinga Investments CC t/a Waste Rite v Buffalo City Municipality* [2009] JDR 0299 (EL); *Zimport Water Service CC v Minister of Public Works* (37169/06 & 41073/06) [2008] ZAGPHC 82, 60–61; *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) 36. See also Quinot "Enforcement of Procurement Law" (2011) *PPLR* 202.

[141] Chapter VIII, para 2, 228.

[142] *Scanwell Lab., Inc. v Shaffer* 424 F.2d 859 (D.C. Cir. 1970).

[143] Marshall, *et al* (1991) *Hofstra L Rev* 4.See also JC Coffee Jr "Understanding the Plaintiff's Attorney: the Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions" (1986) 86 *Colum L Rev* 669.

[144] Pachnou (2000) *PPLR* 64.

and the bidders. Without the moderating power of the review authority unwholesome practices are likely to ensue.[145] Apart from this, bidder remedies generally act as a deterrent against various forms of corrupt practices in public procurement. A survey of bidders by the American Bar Association in 1989 showed that "a large majority of respondents said they believed the existence of the Board protest forum provides a deterrent to improper or illegal agency activities".[146] This is more pronounced where supporting elements are present, such as right of quick access to procurement records and information, well-informed and competitive suppliers, collaboration between the review authority, and an anti-corruption body in the state, among others.

Providing for bidder remedies contributes to boosting bidders' confidence in the public procurement system.[147] Bidding for contract involves spending valuable business time and money in obtaining bid documents, preparing the tender, and submitting it. Bidders would want to be sure that their business time and money will not be wasted in a tendering process that is not conducted according to rules. If the bidders are not confident that they will get fair treatment in the tendering process, a significant number of them may abstain from the process, thereby limiting competition. Naturally, bidders do not expect that procuring entities will always follow the procurement rules; what is important is that anytime there is a breach of rules that there is an opportunity for redress. The more effective the remedies regime the more confident the bidders will be to participate in that procurement system.[148] As pointed out by International Trade Centre UNCTAD/WTO (ITC):[149]

> "Accessible and efficient review channels enhance the reputation of a procurement system as being fair, objective and competitive- and one in which bidders will participate, thus nurturing a competitive environment".

(ii) Factors adverse to the objectives

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[145] For the situation in Kenya before the establishment of its bidder remedies system see: Akech "Governance of Public Procurement in Kenya" (2006) *J of Intl Law & Politics* 849; see also Udeh (2013) *PPLR* 184.

[146] Cited in R Marshall, M J Meurer & J-F Richard "Curbing Agency Problems in the Procurement Process by Protest Oversight" (1994) 25 (2) *RAND Journal of Economics* 297 300.

[147] See OECD-DAC/World Bank, *Methodology for Assessment of National Procurement Systems* ("MAPS") (2006) 15; Gordon (2006) *Pub. Cont. L.J* 430-431.

[148] Gordon (2006) *Pub. Cont. L.J* 430-431.

[149] ITC, *Elements of a Modern Legal Framework for Public Procurement: the UNCITRAL Model law on Procurement of Goods, Construction and Services* (module from Modular Learning System on International Purchasing and Supply Management for Public Sector) 20.

Nevertheless, there are factors that may undermine the objectives of establishing a bidder remedies system, and in effect weaken its effectiveness. The two most significant of these factors are unwillingness by bidders to take advantage of the right of review, and, the refusal or neglect of procuring entities to comply with the decision of the review authority.

There are various causes of bidders' unwilling to initiate a review proceeding, depending on the jurisdictions. However, about seven factors have been identified as the common causes.[150] One is ignorance of the existence of such review rights, especially in jurisdictions where the right was hitherto not available. Two, is the high cost of pursuing the review, particularly in jurisdictions where the review process necessarily involves representation by legal practitioners, and multiple appeals are allowed. Three, is where there are procedural difficulties surrounding review proceedings. These difficulties may be due to observance of strict procedural rules, and the imposition of stringent legal requirements for obtaining remedies. Four, is that there may be the fear of retaliation from the affected procuring entity. Five, is a history of a low level of success and uncertainty in obtaining remedies from challenge proceedings.[151] Six, is where there is a culture of aversion to litigation and finally, where there are other effective mechanisms for getting redress for wrongs done in procurement proceedings.

On the other hand, the refusal or neglect by the procuring entities to comply with the decisions of the review body may be due to: the body's low level of standing in the government structure, review body's lack of authority to enforce its decisions, and vagueness of terms and timeframes for decision making by the review body.[152] These are discussed further in relation to the jurisdictions under study in chapters 5 to 7.

(iii) Adverse effects of bidder remedies

A bidder remedies system may also have some adverse effects. For example, a disruption of the procurement process may arise through the speculative instigation of review proceedings by aggrieved bidders;[153] or where review proceedings are allowed to last for an indefinite length of time; and, where multiple appeals of review decision are permitted by law. The

[150] See Zhang (2007) *PPLR* 325 333-337; and Pachnou *The Effectiveness of Bidder Remedies* ch 8 s 2, for a detailed discussion on causes of suppliers' unwillingness to initiate challenge proceedings.

[151] See the empirical research findings of Pachnou *Effectiveness of Bidder Remedies* 190, 346 on the subject, in relation to the UK and Greece. See also Arrowsmith (1992) *PPLR* 117.

[152] See MAPS 39-41.

[153] Arrowsmith *Government Procurement* 305. See also Marshall *et al* (1991) *Hofstra Law Review* 58 68; Zhang (2007) *PPLR* 338.

disruption is more severe where procurement proceedings are suspended pending determination of the review process; or, where concluded contracts are allowed by law to be set aside. Disruption of the procurement process may cause economic losses or hardship for both the government and the successful bidder (where it has acted by reason of the award or contract), and also for the general public that are to be beneficiaries of the procurement.[154] Moreover, where substantial damages or compensation can be awarded to bidders against a procuring entity, it translates to direct loss of public funds, which would have been utilized for the public good.[155] In order to avoid a challenge, procuring entities may become unduly hesitant in taking decisions, to the detriment of efficient procurement;[156] and may be willing to negotiate a compromise with a bidder that threatens a challenge. This may further lead to corruption, circumvention of competition, and double standards.[157] However, the adverse consequences of a bidder remedies system will to an extent depend on the characteristics of the procurement regulatory framework, in particular whether their provisions are clear.[158] How this relates to Nigeria and South Africa are analysed in chapter 4.

Considering the adverse effects that a bidder remedies system is likely to have on a government, a successful bidder and the public at large, it is necessary to weigh their interests against those of an aggrieved bidder if a remedies system is to meet the ends of justice. In other words, there ought to be a balance between the objective of protecting the rights of aggrieved bidders and maintaining an efficient public procurement system that delivers needed goods, works and services in a cost-effective and timely manner.

2 3 2 3 Components of a bidder remedies system

The aim here is to briefly set out the general components that commonly make up a bidder remedies system. This is a background for the later analysis of the structure of the bidder remedies systems of Nigeria and South Africa.

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[154] See Arrowsmith *et al*, *Regulating Public Procurement* 774; Zhang (2007) 339.

[155] J M Fernández Martín *The EU Public Procurement Rules: A Critical Analysis* (1996) 214. See also Zhang (2007) *PPLR* 339.

[156] Marshall *et al* (1994) *RAND Journal of Economics* 297-317; Zhang (2007) *PPLR* 337. See also European Commission *The Single Market Review; Sub-series III: Dismantling of Barriers* Vol 2, *Public Procurement* (1997) 147.

[157] Marshall *et al* (1994) *RAND Journal of Economics* 298 300; Pachnou *The Effectiveness of Bidder Remedies* 402; Zhang (2007) *PPLR* 337-338.

[158] Arrowsmith *et al*, *Regulating Public Procurement* 760. See also A Brown, "Effectiveness of Remedies at National Level in the Field of Public Procurement" (1998) 4 *PPLR* 89 93.

A bidder remedies system ought to have the following structural elements: enabling legislation, causes of action (matters subject to review), *locus standi*, review forum(s) and their jurisdictions, remedies or powers of the forum, time limits for various aspects of the review, practice and procedure and standard of review. These matters are briefly discussed below.

(i) Enabling legislation: It is preferable to establish bidders' right to procurement challenge by legislation. Even though, as seen above,[159] in the absence of enabling statutes some jurisdictions have recognized the rights of bidders to judicial review of contract award decisions,[160] such judicial review has limitations that make it inadequate as a remedy for bidders. Some of the limitations of review rights founded solely on case law include, one, the uncertainty of the extent of the right and remedies. Two, there is a wide discretion by the court to grant or refuse traditional judicial review remedies, such as certiorari or mandamus.[161] Three, there is a limited applicability of some of these remedies where the public body sued is held to have exercised a discretional power or duty and not a mandatory duty.[162] Four, judicial review ordinarily involves stringent legal and procedural hurdles. Finally, except as otherwise provided by a legislation, there is a lack of specific timeframe for granting judicial review remedies. On the other hand, legislation is usually clear and definite in providing for review rights and remedies. It is preferable for such legislation to be a statute instead of a subsidiary legislation. This is because a bidder remedies system established by a statute is more secure than the one by a subsidiary legislation. Subsidiary legislation can easily be amended or repealed (thereby modifying or truncating the remedies system) by a single authorized person

[159] 2 2 2.

[160] As such decisions were regarded as an administrative action.

[161] For example, mandamus is a discretionary remedy which the court may refuse to grant even where a public duty sought to be compelled is owed, and it will not be issued where other adequate remedies exist. See *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; *Ex parte Wall*, No. 1061381 (Ala. October 5, 2007); see also *Young v Judicial Service Commission* [2008] 9 NWLR (Pt 1091) 1; *R v All Saints, Wigan* 1 App. Cas. 611, 620; *Commissioner for Local Government Lands & Settlement v Kaderbhai* (1931) A.C. 652, 660; *The Queen v Minister of Lands & Survey (ex parte The Bank of the North)* (1963) 2 All N.L.R. However, it is trite law that where a court or judge is given the discretion to make or refrain from making an order such discretion must be used judicially; see *Fawehinmi v Akilu (1)* (1987) 2 NSCC 1265.

[162] See *Triggs v Staines UDC* (1969) 1 Ch. 10; *CBN v System Application Products Nigeria* (2005) 3 NWLR (Pt 911) 152; see also *Secretary of Education and Science v Tameside MBC* (1976) 3 All E.R 665 (H.L); *Padfield v Minister of Agriculture* [1968] AC 997, [1968] UKHL 1, [1968] 1 All ER 694, [1968] 2 WLR 924; *R v Northumberland Quarter Sessions ex . Williamson* (1965) 2 All E. R. 87 (1965) 1 W.L.R. 700.

or an agency, without recourse to the rigours of legislative process, which an amendment or repeal of a statute entails.[163]

(ii) Causes of action: Every bidder remedies system ought to provide for matters that are subject to review. In other words, the circumstances, actions or decisions that may give rise to challenge proceedings should be clearly stated by or known in law. This is because there should be a limit to litigation and there ought to be appropriate causes of action. All matters subject to review involve non-compliance of a decision or action of the procuring entity with the provisions of the procurement law. But it is not all non-compliant actions or decisions that may attract a remedy. Some jurisdictions provide for additional elements, which shall be present for the non-compliant actions or decisions to attract a remedy. Such additional elements may include proof by the claimant that it suffered or risks suffering loss or damage due to the breach.[164] There are jurisdictions that provide for matters that are not reviewable, such as defence procurement, concluded contracts and the choice of procurement method.[165] Matter(s) exempted from review ought to be minimal, if at all; and, should only be those where the benefits of review are outweighed by the cost or effects of review.

(iii) Right to initiate a bidder remedies proceeding: This is generally not open to all members of the public, and the law may imply or expressly stipulate those that may apply for review. It is usually only bidders or potential bidders that are regarded as possessing the right to bidder remedies.[166] Where the right is merely founded on case law, as in jurisdictions that regard contract award as an administrative act subject to judicial review, the right to sue is determined by common law principles of *locus standi*. This entails that a person who seeks a remedy in court against an administrative action must show that it is directly affected by that action. There must be an assertion of right by such a person, which is peculiar or personal, and

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[163] See Udeh (2013) *PPLR* 185, for comments on the situation that existed in Kenya when its Exchequer and Audit (Public Procurement) Regulations 2001 was the enabling legislation for its supplier review system, before the enactment of its Public Procurement Act 2005.

[164] See UNCITRAL Model Law art 64(1).

[165] The 2011 UNCITRAL Model Law does not exclude any matter from review. However, the 1994 version, in art 62(2), excluded six matters (effectively five) from review; viz.: (a) choice of procurement method; (b) decision backed by law to limit procurement proceedings on the basis of nationality; (c) decision to reject all tenders, proposals, offers or quotations before acceptance where the tender documents stipulate that they could be so rejected; (d) a refusal by the procuring entity to respond to an expression of interest in participating in request-for-proposals proceedings; (e) an omission to include information relating to reference to applicable legislation in solicitation documents.

[166] Most international procurement regimes extend the right to initiate a challenge to interested suppliers or contractors. See UNCITRAL Model Law art 64; Guide to Enactment, ch VIII B para 2 at 234; Directives 2007/665/EC) art.1; GPA art XVIII(1).

that right must have been infringed or there is a threat of such infringement.[167] It is crucial to define or limit those with review rights to prevent a disruptive increase in procurement litigation.[168]

(iv) The forum: The following forums were identified in section 2 3 1 above as possibilities for entertaining bidder remedies: the procuring entity itself, a higher administrative body or a special agency with power to entertain such reviews, or a court.[169] A challenge before the procuring entity itself or a higher administrative body or a special agency is referred to as administrative review. A challenge before a court of law could be referred to as judicial recourse or judicial enforcement. Judicial recourse may be brought by way of an ordinary writ/summons procedure, by judicial review or an appeal.[170] It is important that the appropriate form of recourse is known, since the form will determine the procedures that shall apply and the remedies that may be sought and obtained. To illustrate this, five remedies are generally available in a review action (except where legislation provides the contrary): (a) certiorari or a set-side, to quash a decision already made; (b) prohibition, to restrain an authority from carrying out a decision which is unlawful; (c) mandamus, to compel an authority to make a lawful decision, or to carry out a public duty; (d) an injunction, normally used like prohibition to prevent unlawful action; and (e) a declaration, by which the court declares that particular conduct is unlawful.[171] Conversely, remedies in an appeal will include pronouncing on the correctness of the decision appealed against, substituting the decision appealed against, or upholding the decision, and giving consequential orders.[172] However, the effect of the various remedies available in a review may be the same for similar remedies in an appeal. Furthermore, a challenge proceeding may involve combining a writ procedure alongside a review

[167] *Adesanya v President, Federal Republic of Nigeria* (1981) 1 All NLR 1, (1981) 2 NCLR 358; *Fawehinmi v Inspector-General of Police* (2002) 7 NWLR (Pt 767) 606 689; *Olawoyin v Attorney-General, N.R.* (1961) All NLR 269 270, (1961) 2 SCNLR 5; *Shibkau v Attorney-General of Zamfara State* [2010] 10 NWLR (Pt 1202) 312.

[168] Guide to Enactment, commentary 2 on art 64

[169] It is usually the ordinary court. However, recourse may be to an administrative court, such as in Zimbabwe; see Zimbabwe Public Procurement Act s 77; J Zowa, N Machingauta & P Bolton "The Regulatory Framework for Public Procurement in Zimbabwe" in G Quinot & S Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) 200 204.

[170] Quinot "Supplier Remedies" in *Public Procurement Regulation* 312. See also Arrowsmith (1992) *PPLR* 96-97 105 110.

[171] Arrowsmith (1992) *PPLR* 96. On how these remedies are applied in Kenya see Udeh (2013) *PPLR* 198-199.

[172] See *Cupero Nig Ltd v Fed Ministry of Water Resources* Suit no. FHC/Abj/CS/867/11. See also *Logios v Custodian of Enemy Property* NLR [XIX] 34; *Taofeek Alao v African Continental Bank Ltd* (2000) 6 SC (Pt I) 27.

application, where court's rules of procedure permit.[173] This combination is employed where damages (generally not a judicial review remedy) is intended to be sought in conjunction with judicial review remedies.[174]

Depending on a system in question, judicial recourse may be the only relief available to an aggrieved bidder.[175] It may be an alternative to administrative review or a relief for a bidder dissatisfied with the outcome of an administrative review.[176] The decision arising from a judicial recourse may not be subject to an appeal; or it may entail further appeal(s) to a higher court, depending on the jurisdiction. It is regarded as ideal that where a review before a procuring entity exists, further review or appeal should lie to an administrative or judicial body independent of the procuring entity.[177] States may have one or all of the aforementioned forums for handling a bidder challenge. In jurisdictions where there are two or three strata of challenge, it is usually required that before a forum at the top of the hierarchy (such as a court) can entertain a challenge, the case must have been heard by the forums below. This is in accord with administrative law principle that internal remedies ought to be exhausted before judicial review can be sought.[178] Each forum may have different remedies that it may grant to the aggrieved party.

(v) Remedies available: The remedies that a review forum may grant in the course or as a result of a bidder's challenge depends on the power vested in that forum by the enabling law. It is usual for the power of a review body to include corrective actions, such as requiring a procuring entity that has acted in breach of the law to act in a compliant manner. Suspension of the affected procurement proceedings may be part of the remedy that could be obtained from the review body, or legislation may make it automatic on filing of a complaint. Remedies may also include grant of financial awards to the aggrieved bidder, where the bidder has suffered injury or loss. This financial award may be in the form of damages or compensation. The extent

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[173] For example, the English Supreme Court Act 1981(as amended by Civil Procedure Act 1997) s 31(4). See Arrowsmith (1992) *PPLR* 96.

[174] Arrowsmith (1992) *PPLR* 97 104-105.

[175] As is obtainable in Namibia (by virtue of general principles of administrative law and law of contract and tort/delict). See S K Amoo & S Dicken "The Regulatory Framework for Public Procurement in Namibia" in G Quinot & S Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) 123 129; Zowa *et al* "Zimbabwe" in *Public Procurement Regulation* 204. See also Quinot "Enforcement of Procurement Law" (2011) *PPLR* 312.

[176] In Quinot "Supplier Remedies" in *Public Procurement Regulation* 312, seven of the nine African countries reviewed provided for judicial recourse following administrative review.

[177] UNCITRAL Model Law, arts 64 & 67. See also MAPS, sub-indicator 10(e).

[178] See Plasket, R in *Reed v Master of the High Court of SA* [2005] 2 All SA 429 (E) OP 436A; *Kasunmu v Shitta-Bey* [2006] 17 NWLR (Pt 1008) 372. See also PAJA s 7(2); Guide to Enactment, VIII A para 34 235.

of financial claims that can be made and recovered will depend on the legal systems involved. In some jurisdictions, the forum may even have powers to set aside an already concluded contract, where the award process did not comply with the law.[179] However, owing to the adverse effect of a set aside, the review of concluded contracts is prohibited or limited in some jurisdictions.[180] As discussed above,[181] to strike a balance between the interests of aggrieved bidders and the successful bidder, procurement systems may provide a mandatory standstill period to forestall the hasty signing of a contract with intention to circumvent review. This standstill period is effective between the notice of award of contract and the conclusion of contract, to enable aggrieved bidders to challenge the procurement proceedings before contract signing.[182] Other safeguards include:

- suspending the procurement proceedings once a complaint is made so that no further steps are taken towards awarding and signing the contract;
- prohibiting the signing of the affected contract once the procurement proceedings in question has been challenged;
- fixing conservative time-limits within which to conclude review process, to remove the pressure to conclude contract owing to the need for the procurement.

(vi) Procedural rules: The procedural rules of a review forum may be provided by the procurement legislation or another legislation, or made by the forum in the exercise of their inherent powers. Some of the procedural rules include: time-limits for bringing a complaint before the various forums; time-frames for hearing and disposing of a case; giving of notice to parties; and, the standard of review. For judicial review, the courts usually have elaborate general procedural rules for their proceedings.

[179] Concluded contracts can be set aside by a bidder review forum both in South Africa and Nigeria, as would be discussed in chapter 5.

[180] For example, Kenya: Public Procurement Act s 167(4)(c). The EU Remedies Directive 89/665/EEC (as amended by Directive 2007/66/EC), art 2(7), directs that member states may provide that "after the conclusion of a contract in accordance with the Directives, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.

[181] 2 3 2 1.

[182] See for example UNCITRAL Model Law arts 2(r) and 22(2); preamble 4-11 18 to the EU Directive 2007/66/EC; the EU Remedies Directive 89/665/EEC (as amended by Directive 2007/66/EC) art 2a(2).

2 4 What constitutes an effective bidder remedies system?

2 4 1 Introduction

Since the core of this study relates to the "effectiveness" of the bidder remedies systems of South Africa and Nigeria, it is pertinent to consider the question: what constitutes an effective bidder remedies system? Effectiveness here refers to the characteristics of a bidder remedies system in relation to meeting certain standards. This section considers the elements that may act as the standards with which to measure effectiveness.

2 4 2 Effectiveness in context

Several papers have been written and numerous judicial pronouncements made on the EU legal principle of effectiveness as it applies to public procurement, particularly its remedies or enforcement regimes.[183] It is accordingly necessary to distinguish effectiveness of remedies under EU jurisprudence from effectiveness under general procurement remedies system. The principle of effectiveness is one of the general principles of EU law that governs enforcement of EU obligations, which includes adherence to EU procurement rules.[184] Put simply, it requires that remedies for enforcement must be effective. Both the EU Remedies Directives and the Utilities Remedies Directives[185] state that remedies must be "effective".[186] However, "effective" is not defined by the legislative texts; thus, it is left for judicial and scholarly interpretation. It has been held to mean that procedural conditions laid down by national law may not be applied if their effect is to render "practically impossible or excessively difficult the exercise of rights conferred by [EU] law."[187] It might mean that the remedies system as a

[183] See for example, Pachnou (2000) *PPLR* 55; A Amull "The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?" (2011) 36(1) *E L Rev* 51; M Oder "Requirements of Effective Remedies Prior to the Conclusion of a Contract: A Note on the Judgment of the Court of Justice in Commission v Spain (Case C-444/06)" (2008) 5 *PPLR* NA212-215; Arrowsmith (1992) *PPLR* 114-116; S Arrowsmith "The Community's Legal Framework on Public Procurement: The Way Forward at Last?" (1999) 36 *Common Market Law Review* 13; F Snyder "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques" (1993) 56 *Modern law Review* 24; Arrowsmith "Enforcing the Public Procurement Rules" in *Remedies* 49. A few of the relevant cases include: *Alcatel Austria AG v Bundesministerium fürWissenschaft und Verkehr* (Case C-81/98) [1999] E.C.R. I-7671; C-60/90 and C-9/90 *Francovich v Italy* [1992] E.C.R. I-5357; C-14/83 *Von Colson v Land Northeim Westfalen* [1984] E.C.R. 1891; C-106/77 *Administrazione delle Finanze dello Stato v Simmenthal SpA* [1978] E.C.R. 629.

[184] The other general principle is non-discrimination. See C-33/76 *REWE v Lanwirtschaftskammer Saarland* [1976] E.C.R. 1989; C-45/76 *Comet BV v Produktschap voor Siergevassen* [1976] E.C.R. 2043; C-179/84 *Bozetti v Invernizzi* [1985] E.C.R. 2301.

[185] Directive 92/13 (as amended by Directive 2007/66/EC)

[186] See recital 7 of the Remedies Directive and recital 10 of the preamble of the Utilities Remedies Directive.

[187] *Unibet London Ltd v Justitiekanslern*(C-432/05) [2007] E.C.R. I-2271; [2007] 2 C.M.L.R. 30 [43].

whole should constitute an effective system for upholding EU procurement policy; for example, by providing a sufficient deterrent to breaches, and for the correction of breaches where this is not outweighed by other interests.[188] Arrowsmith[189] points out that: "It might, in addition require that effective protection be given to the interests of individual contractors who are adversely affected by a breach of the rules."

That the review or remedies must be "effective" may further cover a whole range of issues related to national enforcement of EU procurement rules, such as access to the courts, rules of evidence, time limits and types of redress that must be available, in particular relating to the issue of damages.[190] The EU's principles of effectiveness is quite broad as it covers several matters of overall EU law enforcement. However, some aspects of it relate to the general perspective of elements of an effective bidder remedies system.

On the general perspective of effectiveness of a remedies system, the UNCITRAL Model Law is adopted here as the standard. The rationale is that the Model Law is a successful benchmark for legal reform in procurement and supports the harmonization of procurement regulation internationally.[191] The Guide to Enactment states that the Model Law contains provisions aimed at ensuring "an effective challenge mechanism";[192] but does not explain what that entails. Nonetheless, one can glean from the Model Law and the Guide to Enactment what may constitute an effective bidder remedies system. The literal interpretation of "effective" is also employed in aid of this construction exercise.

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[188] Arrowsmith (1992) *PPLR* 98.

[189] 98.

[190] 98 & 115; Pachnou (2000) *PPLR* n34.The Remedies Directives, art 2, provide that the remedies available for enforcement of EU procurement rules shall include: the award of interim measures, the setting aside of decisions, and the award of damages.

[191] Guide to Enactment pt I A para 5, 2. See also C Nicolas "A Critical Evaluation of the Revised UNCITRAL Model Law Provisions on Regulating Framework Agreements" (2012) 2 *PPLR* 19 19. For commentary on the status and impact of the Model Law see generally S Arrowsmith "Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard" (2004) 53(1) *ICLQ* 17; and, R Hunja "The UNCITRAL Model Law on Procurement of Goods, Construction and Services and its Impact on Procurement Reform" in S Arrowsmith & A Davies (eds) *Public Procurement: Global Revolution* (1998) ch 5 (although the commentaries relate specifically to the 1994 version, they are still largely relevant).

[192] Chapter VIII A para 4, 228. The UNCAC art 9(1)(d) also refers to "An *effective* system of domestic review, including an *effective* system of appeal" (emphasis added) for enforcing compliance with procurement rules. The GPA art XVIII (1) provides for the establishment of an "*effective* procedures enabling suppliers to challenge alleged breaches of the Agreement or a failure to comply with a Party's measures implementing this Agreement" (Emphasis added).

2 4 3 Elements of an effective bidder remedies system

The "elements of an effective mechanism", that the Guide to Enactment refers to are discoverable from the Guide.[193] For instance, there is a commentary in the Guide that "[a] key characteristic of an effective challenge mechanism is that it strikes the appropriate balance between, on the one hand, the need to preserve the interests of suppliers and contractors and the integrity of the procurement process and, on the other hand, the need to limit disruption of the procurement process."[194] Another commentary is that "allowing disclosure to the suppliers or contractors that presented submissions of the relevant parts of the record at the time when the decision to accept a particular submission has become known to them is to give *efficacy* to the right to challenge."[195] The principles contained in the above commentaries are adapted here as part of the elements of effectiveness. Additional elements are suggested by this work, derived from the literal interpretation of "effective". A thing is "effective" if it produces the result that is wanted or intended.[196]

The key issues that ought to be addressed in designing a bidder remedies system, as presented by Gordon,[197] are related to the elements of effectiveness treated in this study. The issues include: where in the government is the protest forum located; how broad is the forum's jurisdiction; who has standing to protest; what are the time limits at the forum; what evidence does the forum have before it in reaching its decisions; is the procurement put on hold during the protest; how difficult is it for a protester to win; what power does the forum have to provide meaningful relief if it finds that the protest is justified. These issues are here subsumed within the elements of effectiveness and analysed by this study, as they relate to the Nigerian and South African bidder remedies. Nevertheless, the elements of effectiveness extend beyond the issues raised by Gordon. The issues focus on the design of the review forum(s).[198] Whereas, the elements of effectivess relate to the design of the whole remedies system.

The elements of an effective bidder remedies system are as follows:

- Bidders have a *general* right to challenge an act or decision of a procuring entity;

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[193] Chapter VIII A para 8, 228-229.
[194] Chapter VIII A para 18, 231.
[195] Guide to Enactment, commentary on Model Law art 25, para 7, 96 (emphasis added).
[196] A S Hornby *Oxford Advanced Learner's Dictionary* 7 ed (2005), 469 "effective".
[197] Gordon (2006) *Pub. Cont. L.J* 427. See also G Musila "The Right to an Effective Remedy under the African Charter on Human and Peoples' Rights" (2006) 6 *African Human Rights Law Journal* 442 446-449; *Sir Dawda Jawara v The Gambia* 147/95-149/96 paras 31-35, 38-39.
[198] 433-444.

- there are no unlawful acts or decisions in a procurement procedure that are exempt from challenge;
- bidders have right of prompt access to related procurement records;
- at least, a body to hear a challenge as a first step and a further body to hear an appeal as a second step;
- the possibility of intervention without delay by the body;
- the body has power to suspend or cancel the procurement proceedings and to prevent in normal circumstances the entry into force of a procurement contract while the dispute remains outstanding;
- the body has power to implement other interim measures, such as giving restraining orders and imposing financial sanctions for non-compliance;
- the body has power to award damages;
- challenge proceeds swiftly within a reasonably short period of time, which should be measured in terms of days and weeks in the normal course;
- decisions of review body are binding;
- decisions/remedies given can be easily enforced by a fast and simple mechanism;
- the objectives and interests involved are balanced;
- disadvantages of challenge mechanism, such as disruption of the procurement, are minimal.

Each of the above elements has integral components that make for an effective bidder remedies system. These elements are used in subsequent chapters to comparatively assess the effectiveness of the bidder remedies systems of South Africa and Nigeria.

2 5 Other enforcement mechanisms

A bidder remedies system is the foremost[199] but not the only mechanism for monitoring and enforcing public procurement rules. Others include: investigation and review by government oversight bodies exercising an audit or control function; public complaints mechanism, such as ombudsmen systems; and, in the context of a trade regime, supervision by the trade organisation or other state parties to the trade agreement, in other words, supra-national or

[199] Guide to Enactment Ch VIII para 2 228: it makes the systems to "an important degree self-policing and self-enforcing".

inter-governmental oversight mechanisms.[200] Where a law provides that a certain breach of procurement rules amounts to an offence, prosecution of a suspected offender (who may include bidders and officials of procuring entities) by law enforcement agencies, is also a form of enforcement of procurement rules. While a bidder challenge addresses breaches of rules and procedures only at the instigation of bidders, the other oversight mechanisms may deal with infringements where bidders choose not to take action. These mechanisms can also address systemic issues, such as widespread corruption in procurement processes; for instance, collusion amongst bidders and procuring entities to circumvent competition or bypass procurement rules. The secondary enforcement mechanisms are usually accessible to any member of the public, or the members of supra-national or inter-governmental organizations.[201] Bidders involved could also invoke these secondary mechanisms. Bidders usually take this course where bidder challenge is not or no longer available for them; or where they do not want their identities revealed; thereby using the mechanism as an indirect way of reviewing the procurement proceedings concerned.[202]

These secondary mechanisms are mainly directed at giving effect to the provisions of procurement regulations and improving the system in general, and not at giving remedies to a particular bidder. Notwithstanding, there are instances where an aggrieved bidder may find it preferable to invoke the oversight mechanism instead of applying for a review. An instance is where the bidder does not have standing to apply for review for various reasons, such as: being out of time for bringing a complaint; and, not coming within the definition of a person that can exercise a right to review (for example, a supplier who did not bid in that procurement, as is the case in certain jurisdictions).[203] Another instance is where a bidder review does not apply. An example is where a contract has been concluded, in a jurisdiction that does not permit the review of concluded contracts.[204] Another example is where the breach relates to a matter that is not subject to review; for instance, in a jurisdiction where a procuring entity's choice of procurement method is not challengeable.

Remedies that may derive from the national institutional enforcement mechanisms may even be more far-reaching than those obtainable from a bidder challenge. Some of the common

[200] See Zhang (2007) *PPLR* 341-347; Marshall *et al* (1991) *Hofstra Law* Review 29-32.
[201] See Udeh (2013) *PPLR* 202, as this relates to Kenya.
[202] Udeh (2013) *PPLR* 202.
[203] 202.
[204] Such as Kenya; see Udeh (2013) *PPLR* 202.

remedies obtainable under this head include: debarment of offending bidders;[205] nullification of the procurement proceedings and cancelling a concluded procurement contract. The national oversight institutions usually have powers to investigate allegations of illegalities and fraud in public procurement; and if an offence has occurred, the relevant authority may commence prosecution. Where a breach of procurement rules constitutes an offence, such a case will be handled as a criminal matter. This criminal law aspect of public procurement law enforcement may be necessary in jurisdictions where corruption is significant.

The secondary enforcement mechanisms have their limitations, and a few are mentioned here. The powers (tantamount to remedies) exercisable by oversight bodies are usually discretionary. In other words, the relevant authorities generally may not be compelled to exercise the powers or grant the remedies.[206] In addition, most aspects of these mechanisms are not adjudicatory in nature; and, may therefore not require certain procedural safeguards, such as allowing representations from parties aggrieved by the procurement in question. In most cases, the investigation findings cannot be challenged where a person does not agree with them.[207] Conversely, findings made in an adjudicatory process are generally reviewable by a court or tribunal on appeal. Where the mechanism is one relating to criminal offence, the burden of proving a procurement-related offence (beyond reasonable doubt) is higher than that required in a challenge proceeding. In effect, an act which may be proved as a breach, giving rise to a remedy, in a challenge proceeding, may escape sanction or correction in the case of a criminal trial as a result of stricter burden of proof. Finally, findings and recommendations of some investigating entities, such as ombudsmen, are often not directly enforceable in law, but are only reported to other public entities, such as a legislature, for further action. The issues raised here that are relevant to South Africa and Nigeria are addressed in detail in chapter 8.

2 6 Analysis and Conclusion

As seen above,[208] the objectives of regulating public procurement stand better chances of being actualized where there are enforcement mechanisms within the procurement system. The effort by many African countries to enact procurement legislation in itself may have begun to alter

[205] See generally Williams-Elegbe *Corruption in Public Procurement*; S Williams "The Debarment of Corrupt Contractors from World Bank-Financed Contracts" (2007) 36(3) *PCLJ* 277, for a detailed discussion on debarment in public procurement.

[206] Mandamus may not be granted to compel the performance of a discretionary power. *See R v Marshland Smeeth and Fen District Commissioners* [1920] 1 K.B. 155 [165] and *R v London (Mayor)* 3B & Ad.254.†.

[207] An exception is where a person indicted by the finding is being tried on the strength of it.

[208] 2 2 4.

the perception and conduct of actors (state, state officials, contractors and suppliers) in relation to public procurement. Flowing from this, it could be postulated that adherence to procurement law can be achieved by developing the capacity of the actors to follow the law, for example through training. This postulation derives from the Normative and *Managerialism* theories of compliance.[209] Normative theories argue that compliance with law is more as a result of the normative power of rules to alter the perception of people as to what is acceptable behaviour.[210] Its focus is on the persuasive power of norms, legal obligations and ideas. *Managerialists* posit that instances of non-compliance with law or norms are often inadvertent, and arise from a lack of capacity or resources, ambiguous commitments and provisions, and time lags between commitment and performance.[211]

However, these normative and *managerialist* approaches, if solely applied towards actualizing the provisions of procurement regulations, will arguably not do as much as would be needed to sustain an effective public procurement system. This is because procurement involves financial or pecuniary benefits to the actors (especially for bidders), either legitimately or illegitimately; and it is apparently difficult, in the absence of enforcement, to get people to comply with rules that constrain their liberty of making financial gains.[212] In most instances, it is bidders eager to win contracts that induce officials of procuring entities to act improperly, in breach of procurement rules.[213] In addition, procurement regulations usually demand accountability from state officials and also limit their discretion. Enforcement is needed to actualize the demands for accountability and the limitation of discretion, since people do not easily relinquish their convenience and privileges. Furthermore, even where breach of law is

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[209] Normative theories of compliance embody other distinct theories, one of which is *managerialism*. *Managerialism* was developed by Abram and Antonia Chayes.

[210] See Kleinfeld (2011) *Yale L.J Online* 293; TR Tyler & SL Bladeo *Cooperation in Groups: Procedural Justice, Social Identity, and Behavioural Engagement* (2000); TM Franck "Legitimacy in the International System" (1988) *82American J Int'l L* 705; MJ Gilligan "Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime" (2006) 40 *International Organization* 935-967.

[211] See A Chayes & A Chayes "On Compliance" (1993) 47(2) *Int'l Org* 175; A Chayes & A Chayes *The New Sovereignty: Compliance with International Regulatory Agreement* (1995); J Urpelainen "Enforcement and Capacity Building in International Cooperation" (2010) 2:1 *International Theory* 32–49; GW Downs, DM Rocke & PN Barsoom "Is the Good News about Compliance Good News about Cooperation" (1996) 50 *Int'l Org* 379.

[212] D Zaelke, D Kaniaru, & E Kružíková (eds) *Making Law Work: Environmental Compliance & Sustainable Development* (2005)57; P Verboon & M van Dijke "A Self-Interest Analysis of Justice and Tax Compliance: How Distributive Justice Moderates the Effect of Outcome Favorability" (2007) 28 *Journal of Economic Psychology* 704–727.

[213] Williams-Elegbe *Corruption in Public Procurement* 31; S Rose-Ackerman *Corruption and Government: Causes, Consequences, Reform* (1999) 64; T Soreide *Corruption in public procurement: Causes, Consequences, Cures* (2002) ch 3.

not deliberate, enforcement helps to identify or draw attention to the breach, so that the inadvertence or other cause(s) of the breach may be subsequently addressed. This background supports the establishment of a bidder remedies system as a mechanism for enforcing public procurement regulation.

This study henceforth focuses on the Nigerian and South African public procurement systems, particularly the bidder remedies regimes; and assesses them against the elements of effectiveness set out above.[214]

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Chapter 3

The Public Procurement Systems

3 1 Introduction

This chapter presents an overview of the public procurement systems of Nigeria and South Africa. It focuses on the thematic and structural aspects of these systems and how they affect the respective bidder remedies regimes. This provides a background for the direct consideration of the remedies regimes in subsequent chapters.

3 2 Procurement structures and related themes

3 2 1 Scope of procurement

The attempt here is to identify the transactions that are regarded in both jurisdictions as falling within the ambit of public procurement, as it is these transactions that are generally subject to procurement regulations and its enforcement mechanisms. To identify these transactions, it is relevant to determine what constitutes the subject-matter of procurement in these jurisdictions; and whether public procurement includes selling and letting of assets *by* government.

3 2 1 1 Subject-matter of procurement

In Nigeria, "public procurement" means "the acquisition by any means of *goods*, *works* or *services* by the government."[1] This is similar to the definition in the UNCITRAL Model Law.[2] As the "acquisition" may be "by any means", it arguably includes purchase, lease and rental *from* suppliers by the government. This interpretation is supported by the Guide to Enactment to the Model Law,[3] which accords the same scope to "acquisition". However, acquisition of "special" goods, works and services involving Nigerian defence or security is not subject to public procurement regulation and its enforcement mechanism, except where the President consents.[4]

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[1] PPA, s 60 (emphasis added).
[2] Article 2(j).
[3] P 44, commentary on art 2 of the Model Law, para 3.
[4] PPA 15(2). "Special" arguably refers to hard defence materiel or weapons and ammunition; not civil items that may be procured for security organizations or the military. It may also refer to items whose acquisition should not be made public, to protect defence/security interest and secret. See S William-Elegbe "The Reform and Regulation of Public Procurement in Nigeria" (2012) 41(2) *PCLJ* 339 347; Udeh & Ahmadu "Nigeria" in *Procurement Regulation* 155.

In South Africa, public procurement is also known as "supply chain management (SCM)";[5] nevertheless, SCM includes disposal of public assets.[6] Section 217(1) of the South African Constitution mentions "procurement", and alludes that it is "where an organ of state… contracts for goods and services". "Services" used in that section includes "works".[7] This view is supported by *M5 Developments (Cape) (Pty) Ltd v CC Groenewald NO,*[8] where the court referred to the procurement of housing construction as "services"; similar to what the procuring entity termed it in the related bid documents.[9] Furthermore, many South African bidder remedies cases arise from works procurement.[10] Similar to Nigeria, the South African constitutional provision above indicates that contracting for goods and services *from* suppliers *by* organs of state may be by any means, including purchase, rent and lease. Conversely, South African defence procurement is generally subject to public procurement regulation and its enforcement mechanism.[11]

3 2 1 2 Selling and letting of assets

(a) Introduction

Public procurement, as defined by relevant legislation, do not encompass selling and letting of assets by government (also referred to as disposal).[12] The UNCITRAL Model Law and the

[5] This term was introduced by the National Treasury since 2003 when it promulgated the Regulations in Terms of the Public Finance Management Act 1999: Framework for Supply Chain Management 2003 in GG 7837 of 5-12-2003.

[6] Regulation 16A3.1, Treasury Regulations Notice R225 in GG 27388 of March 15, 2005, under the PFMA.

[7] Bolton "South Africa" in *Procurement Regulation* 189. "Works" was mentioned in the Preferential Procurement Regulations 2011 (GN R 501 in GG 34350 of 08-06-2011), example regs 1(s), 3(a) & (c); but omitted in the 2017 version (GN R 32 in GG 40553 of 20-01-2017), similar to the constitution that regards "services" as including "works".

[8] [2009] ZAWCHC 3.

[9] Paragraphs 4 & 9 of judgment.

[10] Examples: *City of Cape Town v South African National Roads Agency Ltd* [2013] ZAWCHC 74; *Ibuyile Development Consortium v Premier of Western Cape* [2012] ZAWCHC 204; *Manong & Associates (Pty) Ltd v City of Cape Town* [2010] ZASCA 169; 2011 (2) SA 90 (SCA); *Indo Contractors CC v TFMC (Pty) Ltd* [2009] ZAKZDHC 20.

[11] Bolton "South Africa" in *Procurement Regulation* 192; S Williams "The Development of Defence Procurement Policy in Nigeria and the Case for Reform" (2005) 3 *PPLR* 153 176. See *Steradian Consulting (Pty) Limited v Armaments Corporation of South Africa Limited* [2011] ZAGPPHC 99. The Armaments Corporation of South Africa Limited (Armcor) Act 51 of 2003, s 4(2)(e), empowers Armcor to establish and manage South African defence procurement system, subject to s 217 of the Constitution.

[12] The UNCITRAL Model Law, art 2(j), defines "public procurement" as "the *acquisition* of goods, construction or services by a procuring entity" (emphasis added). See 3 2 1 2 (b) and (c) below, for related references to Nigerian and South African legislation on the subject-matter. See also art 1(2) of both the EU Procurement Directives and the Utilities Directives. S Wehmeier (ed) *Oxford Advanced Learners Dictionary* 7 ed (2005) 1158

GPA neither referred to nor provided for disposal of government assets.[13] According to Quinot and Arrowsmith, procurement in its broadest sense ends at the performance or termination of a procurement contract.[14] However, procurement legislation of many African countries, including Nigeria and South Africa,[15] regulate disposal of public assets to various extents. This may be in recognition of the relationship between disposal and the life cycle of the things procured. The extent to which Nigerian and South African procurement legislation and its enforcement mechanisms apply to disposal of public assets is examined below.

(b) Nigeria

Public procurement, as defined under Nigerian law is distinct from selling or letting of assets *by* the government.[16] The PPA emphasises this by referring to selling or letting of government assets as "disposal of public property"; and, by providing distinct methods/procedures for disposal in a separate chapter x. Furthermore, PPA's regulation of disposal is limited, as it is subject to the Public Enterprises (Privatisation and Commercialisation) Act 1999; which, among others, regulates the selling of shares of government enterprises.[17] The review or enforcement mechanism under the PPA applies to disposal; but only with respect to the rules and procedures on disposal stipulated by the PPA or the regulations or guidelines made pursuant to the PPA.[18] Thus, it does not extend to aspects of disposal provided under any other legislation.

(c) South Africa

There are divergent opinions on whether "contracts" or "procurement" as expressed in section 217 of the South African Constitution covers selling and letting of assets by government.

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defined procurement as "the process of obtaining supplies of something, especially for a government or an organization."

[13] Also, the Procurement Regulations for IPF Borrowers 2016, and OECD/DAC *MAPS*.

[14] G Quinot & S Arrowsmith "Introduction" in G Quinot & S Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) 1 1. See also Arrowsmith *Public and Utilities Procurement* 1; Arrowsmith et al *Regulating Public Procurement* 1-2.

[15] Also, Botswana, Ethiopia, Ghana, Kenya, Rwanda, and Uganda.

[16] PPA s 60.

[17] PPA s 55(1). The Infrastructure Concession Regulatory Commission (Establishment, etc) Act 2005, regulates the granting of concessions and engaging in public private partnership by the Federal Government towards infrastructural development in Nigeria.

[18] PPA s 54 (1).

Penfold & Reyburn[19] argued that it does not, as "procurement" is defined by the UNCITRAL Model Law as the *acquisition* of goods, construction and services (by government). Bolton has consistently argued that it does; positing that the contrary would be an "unfortunate exclusion", as the principles[20] that the section provides will consequently not apply to selling and letting of assets.[21] However, a literal interpretation of the section appears not to support the latter argument, as the clause: "when an organ of state …*contracts for* goods or service": in section 217(1), indicates that the government is the party accepting the goods and services and not the party offering them. Also, section 217(1) when read in context with section 217(2)(a), which states in part "…a procurement policy providing for categories of preference in *the allocation of contracts*",[22] indicates that the transaction envisaged is where government awards contracts and pays money to suppliers; and not where it sells or lets assets and makes money from it. Furthermore, the maxim *expressio unius est exclusio alterius* (to express one thing implies the exclusion of another) may apply, as selling and letting of assets by government is not mentioned or clearly implied in the section; in addition, the context of the section arguably supports the exclusion.[23] In apparent recognition of this distinction, the Public Finance Management Act No 1 of 1999 as amended (PFMA) and the Treasury Regulations,[24] provide separately for selling or letting of public assets and public procurement. For example, while section 76(1)(k) provides that the National Treasury *must* make regulations or issue instructions

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[19] G Penfold & P Reyburn "Public Procurement" in S Woolman, T Roux & M Bishop *Constitutional Law of South Africa* 2 ed (2003) 25-28. Also, G Quinot "The Law of Government Procurement in South Africa, Phoebe Bolton" (2007) 16 *PPLR* 464 466.

[20] "[A] system which is: equitable, transparent, competitive and cost-effective."

[21] Bolton "South Africa" in *Procurement Regulation* 189-190; P Bolton "Public Procurement System in South Africa" (2007-2008) 37 *Pub Cont L J* 781 784-785; P Bolton *The Law of Government Procurement in South Africa* (2007) 67-68; P Bolton "Overview of the Government Procurement System in South Africa" in K V Thai (ed) *International Handbook of Public Procurement* (2008) 357 364. She supported her argument with the definition of procurement as "[T]he process which creates, manages and fulfils contracts relating to the provision of supplies, services or engineering and construction works, the hiring of anything, disposals and the acquisition or granting of any rights and concessions." by R Watermeyer "Project Synthesis Report: Unpacking Transparency in Government Procurement – Rethinking WTO Government Procurement Agreements" in CUTS Centre for International Trade, Economics and Environment *Unpacking Transparency in Government Procurement* (2004) 1 3. However, the definition does not indicate which party is offering the subject-matter and which is accepting it (which is the crux of the argument).

[22] Emphasis added.

[23] On the maxim, see R Dickerson *The Interpretation and Application of Statutes* (1975) 234-235; E Mureinik "Expression Unius: Exclusio Alterius?" (1987) 104 *SALJ* 264. See also *Colquhoun v Brooks* (1883) 21 Q.B.D. 52 65; *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A) 37G; *National Director of Public Prosecutions v Mohamed NO* [2003] ZACC 4 (CC), 2003 (1) SACR 561; *Peoples' Democratic Party v Independent National Electoral Commission* (1999) 11 NWLR (Pt 626) 200.

[24] See regulations 16A6 (procurement) and 16A7 (disposal of public assets).

applicable to departments, concerning selling and letting of public assets; a separate section 76(4)(c) makes that regulatory function discretionary with respect to procurement. Also, Treasury Regulations 16A6 and 16A7 provide separately for procurement and disposal of public assets, respectively.

Notwithstanding that it will be beneficial if the principles of section 217 are applied to disposal of public assets, decided cases indicate that the "system" envisaged by the section does not generally cover such transactions; although there is one (obiter) that expressed a contrary view. In *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd*[25] it was contended that a grant of a permit over a land by government to an operator to develop an Industrial Development Zone, being contractual, falls within "contracts" as expressed under section 217(1) of the Constitution; and thus, necessitates compliance with the principles under the section. The court dismissed the argument, holding that issuing of a permit does not constitute contracting for goods or services as contemplated in section 217.[26] In *CSHELL 271 (Pty) Ltd v Oudtshoorn Municipality, Oudtshoorn Municipality v CSHELL 271 (Pty) Ltd*,[27] the Court was unequivocal that:

> "There is a difference between the disposal of property and the procurement of goods and services."

Thus, that section 217 does not apply to disposal public assets. However, a legislation may validly adopt the principles of section 217 to apply to disposal, as argued in the next paragraph. In *Giant Concerts CC v Rinaldo Investments (Pty) Ltd,*[28] the Constitutional Court held that the applicant's argument that section 217 of the Constitution applies to a contract by an organ of state to sell land did not help applicant's standing to challenge the sale.[29] However, Binns-Ward J in *SA Metal & Machinery Co (Pty) Ltd v City of Cape Town*[30] opined (*obiter*)[31] that section 217 covers disposal of assets by organs of state. Since this was obiter and *CSHELL* was decided later by the same court, the latter position (in CSHELL) must be read as authoritative.

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[25] [2008] ZAECHC 195; 2009 (5) SA 661 (SE).

[26] This decision was upheld by the Supreme Court of Appeal and the Constitutional Court; see *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* [2010] ZACC 20, 2011 (1) SA 293 (CC), 2011 (2) BCLR 189 (CC).

[27] [2012] ZAWCHC 25, [2012] 3 All SA 527 (WCC) para 36.

[28] [2012] ZACC 28, 2013 (3) BCLR 251 (CC).

[29] Paragraph 57.

[30] (9440/2010) [2010] ZAWCHC 442 fn 2.

[31] Made in passing, and was not in issue.

Nonetheless, Treasury Regulations, 16A3.2 (a), provides that the principles under section 217 of the Constitution shall apply to SCM (which includes disposal of public assets). This would not be regarded as unconstitutional for the following reasons: (1) s 217, on itself, does not extend to selling and letting of assets by government; but, a legislation may validly adopt those altruistic principles under s 217 for other public activities, such as selling and letting of assets; (2) besides, the regulation only mentions the principles (fair, equitable, transparent, competitive and cost effective) without referring to s 217 of the constitution. However, the principles will only apply to selling and letting of asset by bodies that the Regulations apply to;[32] not to that of all public bodies. Also, by virtue of section 14(5) of Municipal Finance Management Act 56 of 2003 (MFMA),[33] the policies that apply to procurement in the municipalities and their entities apply to selling or letting of public assets. Furthermore, the review mechanisms provided under regulation 16A9.3 of the Treasury Regulations, and regulations 49 and 50 of the Municipal Supply Chain Management (SCM) Regulations under the MFMA,[34] apply both to procurement and selling and letting of assets. In contrast, under the Preferential Procurement Policy Framework Act No 5 of 2000 (PPPFA) and the Preferential Procurement Regulations 2017,[35] the procurement preference point systems prescribed do not apply to the sale and letting of government assets.[36] It may be concluded that selling and letting of government assets is not generally regarded as procurement in South Africa. Procurement policies and its enforcement mechanism apply to disposal only to the extent prescribed by legislation. This is practically similar to the Nigerian system as seen above.

3 2 2 Procurement at the tiers of government

There are three tiers of government in Nigeria and South Africa; referred to as federal, states and local governments in Nigeria;[37] and national, provinces and local governments (or municipalities) in South Africa.[38] The existence of tiers of government in both jurisdictions affects the scope of their bidder remedies regimes.

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[32] See Reg 1.2.
[33] Regulates the financial affairs of local governments/municipalities
[34] Notice R868 in GG 27636 of May 30, 2005
[35] GN R 32 in GG 40553 of 20-01-2017, made in terms of s 5 of the PPPFA.
[36] Expressly exempted in para 20.1 of the Implementation Guide: Preferential Procurement Regulations 2011; but silent in the 2017 version.
[37] Sections 2 and 7 of the Constitution of the Federal Republic of Nigeria 1999, as amended (CFRN).
[38] Section 40 of SA Constitution.

3 2 2 1 Nigeria: separate procurement regimes

The tiers of government in Nigeria have separate procurement regimes, owing to certain facts. First, Nigeria is a federal system, where the federation and the states have partly autonomous governments, consisting of separate executive, legislature and judiciary.[39] Second, the federal and states governments exercise power and control over their respective public funds.[40] Expenditures from public funds by these governments are as provided in their separate annual budgets, authorised respectively by an Appropriation Act of the National Assembly and Appropriation Law of each State House of Assembly.[41] Third, the tiers of government have separate public procurement regulatory regimes. Consequently, the jurisdiction of the bidder remedies system established by the federal government does not extend to states' procurement. In fact, currently, only a few states have established a functional bidder remedies system.[42] The federal bidder remedies system operates in the states, but only as it affects federal agencies situate in the states. The local governments have public funds and powers to award contracts towards discharging their functions;[43] however, their financial management is regulated by laws made by the respective states.[44] Thus, the public procurement regulatory frameworks of the states usually apply to the local governments within the states.

The states' procurement regulatory frameworks are largely adapted from the defunct or current federal procurement regimes.[45] For example, many states that have not enacted their public procurement laws rely on Financial Instructions or circulars adapted from the old federal Financial Regulations and related circulars. This is partly owing to a national policy to harmonise public expenditure management in Nigeria. Nevertheless, there is still no uniformity in the public procurement regulation and bidder remedies systems at the federal and state levels in Nigeria.[46]

[39] CFRN, ss 2(2), 4-6. Nigeria is made up of 36 states.
[40] Sections 80-83 and 120-123 CFRN.
[41] Sections 81 (2) and 121(2).
[42] Most states have legislatively provided for procurement challenge mechanisms, but are yet to establish the organizational structure required to operationalize the mechanism.
[43] Set out in 4th schedule, CFRN; see particularly paras 1(f) & (h), and 2.
[44] S 7(1). See *Attorney-General of Lagos State v Attorney-General of the Federation* [2005] 1 MJSC 1.
[45] Udeh & Ahmadu "Nigeria" in *Procurement Regulation*, 143. World Bank, *Nigeria Country Procurement Assessment Report (CPAR)* Vol II (2000) 6.
[46] See William-Elegbe (2012) *PCLJ* 340.

3 2 2 2 South Africa: uniform procurement regime

In South Africa, government is constituted as national, provincial and local spheres of government, which are distinctive, yet interdependent and interrelated.[47]

Regulation of public procurement is significantly uniform within each tier of South African government; but not uniform vertically across the tiers, except the PPPFA and section 217 of the Constitution that apply to all the tiers. For example, the PFMA applies to the national and provincial governments; while the MFMA applies to all the municipalities. Consequently, there is a uniform bidder remedies system across the municipalities, as there is at the national and provincial levels.[48]

Besides, there is a fair measure of regulatory uniformity across the tiers in certain respects. First, the South African Constitution empowers the national legislature to establish a national treasury; and to prescribe measures to ensure both transparency and *expenditure control* in all spheres of government, by introducing uniform treasury norms and standards, among others.[49] Second, the national treasury has mandate over all tiers of government to enforce compliance with the measures prescribed.[50] Third, the budgetary powers of provincial government may be regulated, to an extent, by national legislation.[51] Lastly, South Africa's core public procurement statutes[52] apply to all tiers of government.

3 2 3 Decentralised procurement systems

The public procurement system of South Africa, as well as that of Nigeria, is largely decentralised. A decentralised public procurement system is one in which government or public bodies are each empowered to award their own procurement contracts. Conversely, a centralized procurement system is one in which a specific government body is empowered to procure for all other government bodies.

[47] SA Constitution s 40.
[48] Respectively by virtue of reg 49 (read with reg 50) of the Municipal Supply Chain Management Regulations and s 62 of the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act"); and of reg16A9.3 of the Treasury Regulations.
[49] Section 215(1).
[50] Section 215(2).
[51] Section 226(4).
[52] The Constitution s 217, and the PPPFA.

Nigerian federal government does not procure through a central Tenders Board. Rather, each federal entity is responsible for its own procurement,[53] and is liable to provide bidder remedies for breaches in its conduct of procurement. In most states, each government body has powers to award procurement contracts that are within certain monetary thresholds. Nevertheless, in some of these states, a central Tenders Board awards all contracts whose monetary value are above the award threshold of individual government bodies.[54] Even in the latter case, the government body in need of the procurement may still be involved in some aspects of the procurement, such as signing the contract agreement and handling contract management.[55] In a challenge proceeding against such procurement, the government body may be joined with the Tenders Board as defendants. In the local governments, the Local Government Council, the local government Tenders Board, or the accounting officer (usually the local government Chairman or Secretary) may award contracts within certain thresholds. These authorities can be made defendants in review proceedings, where obtainable.

In South Africa, national and regional government entities have powers to establish and procure through their internal procurement systems.[56] They may also, at least in theory, procure through the State/Provincial Tender Boards, which are central procuring entities.[57] Although it was previously observed that Provincial Tender Boards at the provinces were being dismantled;[58] it appears that a central procuring entity is about re-emerging, as the South African President revealed that: "[G]overnment has decided to establish a central tender board to adjudicate tenders in all spheres of government."[59] The main form of central tendering in South Africa is transversal contracts facilitated by the Treasury, in which contracting

[53] However, where a government body has persistently or seriously breached procurement rules, there may be a temporary transfer of its procuring and disposal function to a third-party procurement agency or consultant- PPA s 6(1)(i)(iv).

[54] Members of State's Tender Board are appointed by the state Governor.

[55] In some states (e.g. Anambra, Katsina), where a contract is within the award threshold of the Tender Board, the government body in need of the procurement may conduct the procurement proceedings up to evaluation and then make its recommendation to the Tender Board, which may award based on the recommendation.

[56] PFMA ss 38(a)(iii), 51(a)(iii).

[57] Established in terms of the STB Act; see also Reg 2, State Tender Board Act 1968: Amendment to Regulations of the State Tender Board Act in terms of Section 13 (2003). While there is currently no formal State Tender Board, central tendering is done by the Office of the Chief Procurement Officer within the National Treasury.

[58] Bolton "South Africa" in *Procurement Regulation* 181-182.

[59] State of the Nation Address by His Excellency Jacob Zuma, on the occasion of the Joint Sitting of Parliament, 13-2-2014; <http://www.sanews.gov.za/south-africa/2014-state-nation-address-full-speech> (accessed 21-6-2017). Note that "adjudicate tenders" in the statement apparently refers to evaluation of tenders- that is the sense in which the term is used in South African procurement system.

authorities from any tier of government collectively procure mutually-needed items;[60] to obtain economy of scale and save procurement cost. The dual system of procurement in South Africa is to an extent similar to the system in some states of Nigeria as seen above. However, in the case of South Africa, it is not the monetary threshold of proposed contracts that determines which of the systems to procure through; instead the entities have discretion to choose from the two. Where a Tender Board is involved, it handles tender proceedings and conclusion of contracts, whereas the entity in need of the procurement handles contract administration.[61] Where this is the case, it may only be the Board (or its chairman) that may be the defendant in the related bidder remedies proceeding; as contract administration falls under contract dispute.[62] A dual system is also obtainable at the municipal level. Each municipality and municipal entity may either handle its contract award through its supply chain management structure or through another organ of state.[63]

As seen above, the type of procurement system that a state adopts may impact on bidder remedies regime of that state. Furthermore, in a decentralized procurement system, the complainant has to identify and challenge the government entity that conducted the procurement complained about. If the defendant can show that it was not involved in the procurement, it may be struck out from the suit on grounds of misjoinder of party. If it is the only party sued, the challenge may be dismissed.[64] In a decentralised system, the burden of defending all challenge proceedings is not born by a single procuring entity. The result is that each entity may reasonably manage the number of review cases against it. Unlike the case of a central procuring entity, where there may be many bidder review cases at the same time, thus,

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[60] Treasury Regulations, reg 16.A6.5. Cases on transversal contract include: *Stiegelmeyer Africa (Pty) Ltd v National Treasury of South Africa* [2015] ZAWCHC 9, [2015] 2 All SA 110 (WCC); *Butsana Textile Services CC v National Treasury* (14166/07) [2015] ZAGPPHC 163; *Sukuma Distributors (Pty) Ltd v Minister of Finance* (3134/2007) [2007] ZAGPHC 286.

[61] RSA *Green Paper on Public Sector Procurement Reform in South Africa: Initiative of the Ministry of Finance & the Ministry of Public Works* Notice 691 of 1997, accessible at <http://www.gov.za/documents/download.php?f=187736> (accessed 21-6-2014).

[62] See for instance, *Steenkamp NO v Provincial Tender Board Eastern Cape* 2007 3 BCLR 300 (CC); *Chairman State Tender Board v Supersonic Tours (Pty) Ltd* [2008] ZASCA, 2008 (6) SA 220 (SCA).

[63] Local Government: Municipal Finance Management Act No 56 of 2003, ss 110(2)(c), 111 & 112(1)(o).

[64] *MEC for Safety & Security v Mtokwana* [2010] ZASCA 88, 2010 (4) SA 628 (SCA); *Crawford-Browne v Manuel* (7390/2008) [2008] ZAWCHC 29; *Manong & Associates (Pty) Ltd v City of Cape Town* [2010] ZASCA 169; 2011 (2) SA 90 (SCA); see also *Sapo v Sunmonu* [2010] 11 NWLR (Pt 1205) 374. See *Attorney-General of Kano State v Attorney-General of the Federation* [2007] 4 NWLR (Pt1029) 164 on the need to identify and sue the proper party.

more challenging to manage. Although it may engage private attorneys, it will bear the payment of their fees.

3 2 4 Procuring entities

As seen in chapter 2, it is procuring entities that are almost always sued in bidder remedies cases. It is thus apposite to consider the status and kinds of procuring entities within the systems under review.

3 2 4 1 Government procuring entities

"Procuring entities" refers to government or public entities that are authorized to contract for good, works and services for theirs or others use; which are subject to applicable procurement regulations.[65] These entities are either fully or substantially funded from public funds. They are legal personalities that can sue and be sued in their corporate names. It is this status that enables challenge proceedings to be instituted against procuring entities. However, in both jurisdictions, it is not unusual to find bidder remedies cases where the accounting officer or authority of a procuring entity is made a defendant.[66] This is because these officers or authorities exercise supervisory powers over procurement within their respective entities, and are consequently accountable to that extent.[67] As would be discussed in Chapter 5, in both jurisdictions, procuring entities or their accounting officers also act as bidder review forums or authorities for reconsideration of their own procurement decisions.

All government bodies in Nigeria and South Africa are procuring entities, to the extent authorized. These include the legislature, executive, judiciary, and government ministries, departments, agencies, and enterprises, in all the tiers. In Nigeria, these bodies are procuring entities by virtue of PPA sections 15 and 60 (for federal); and by similar provisions of states' procurement legislation (for states and local governments). In South Africa, it is by the

[65] Generally, the state or its organs have capacity to contract, under enabling legislation or the common law prerogative of a state. See *Minister of Home Affairs v American Ninja IV Partnership* 1993 (1) SA 257 (AD). L Baxter *Administrative Law* (1984) 389.

[66] See for example *A.C Egbe Nig Limited v Director General of Bureau of Public Procurement* FHC 21-07-2010 suit no FHC/B/CS/116/2010; *The Chairman of the State Tender Board v Supersonic Tours (Pty) Ltd* (389/07) [2008] ZASCA 56.

[67] PFMA ss 36, 38(1), 49, 51(1); PPA ss 16(22), 20. An accounting officer is, for a department, the head of a department; for a corporation or agency, it is the chief executive officer ("CEO"); and for a ministry, it is the Permanent Secretary (in Nigeria). An accounting authority is the board or controlling body of a public entity; or the CEO of the entity, where it has no board or controlling body.

combined effect of sections 217 and 239 of the Constitution, sections 3(1) of the PFMA, sections 1(iii) and 2(1) of the PPPFA; and section 3 of the MFMA.

"Organs of state" is mentioned in section 217 of the South African Constitution, which are bodies that the procurement principles of the section apply to. Opinions about the bodies that fall within the term are considered below.

3 2 4 3 "Organs of state"

It has been argued that entities "exercising a public power or performing a public function in terms of any legislation", are not organs of state with respect to applying section 217 of the Constitution; thus, that they are not subject to its principles.[68] This is notwithstanding that section 239 defines "organ of state" to include any entity "exercising a public power or performing a public function in terms of any legislation". The rationale for the above view is that such entities are not organs of state "in the national, provincial or local spheres of government", as stated by section 217.[69] The argument implies that section 217 applies to only organs of state that carry out regular government operations, businesses or services within the national, provincial and local spheres; such as government ministries, departments and agencies. That excludes statutory institutions exclusively carrying out functions not directly related to governance; such as educational, training or research work.[70] This argument is debatable. Firstly, section 239 is the definition section of the Constitution; thus, terms in section 217 that are defined under section 239 must be interpreted accordingly. Secondly, section 217 reference to organ of state "in the national, provincial or local spheres of government", arguably only indicates that the section binds organs of state operating in or established by legislation made by any of the three tiers of government.[71]

It was further argued that universities are not organs of state to which section 217 applies.[72] There are reasons to disagree with this view. First, according to section 239, "organ of state" includes "institution exercising a public power or performing a public function in terms of any legislation"; thus, universities are organs of state, as they exercise public powers and functions in terms of the Higher Education Act 101 of 1997. However, this does not include

[68] Bolton "South Africa" in *Procurement Regulation* 188.
[69] 188.
[70] 188.
[71] This perspective was alluded to in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 33.
[72] Bolton "South Africa" in *Procurement Regulation* 188.

private universities, as they are not regarded as organs of state under s 51(1) of the Higher Education Act; and they normally do not use public funds for their procurement, to be subject to the requirements under section 217. Secondly, in *Masakhane Security Services (Pty) Ltd v University of Fort Hare*[73] the court regarded the respondent-university as a procuring entity, which procurement regulations are subject to section 217.[74] It held that: "[T]he respondent is an organ of state and therefore its actions and decisions are subject to review in terms of the Constitution."

Under section 239 of the South African Constitution, "organ of state…does not include a court or judicial officer". However, this arguably does not exclude the judiciary as an organ of state for the purpose of section 217. Rather, considering the context, "court" as stated there refers to judges performing adjudicatory functions, not the judiciary as an institution. Thus, where the office of the Chief Judge, the Chief Registrar or a department of the judiciary awards contracts, it should be regarded as an organ of state subject to section 217, the applicable procurement regulations and bidder remedies mechanism.[75]

3 2 4 4 "Private" procuring entities

In Nigeria, where a procurement funded by at least 35 per cent contribution from the federal government is undertaken by a private organization, that organization is deemed a procuring entity, subject to applicable public procurement regulation and its enforcement mechanism.[76] An example is procurement by private joint venture partners of the federal government in the Nigerian oil sector.[77]

There is no similar provision in South Africa. Consequently, a private organization funded to any degree by government may neither be subject to procurement regulation nor the bidder remedies. However, a limited liability company that renders a general service to the public and in which the government owns all the shares is regarded as an organ of state, whose procurement is subject to bidder remedies.[78] For example, SITA, a private limited liability

[73] [2012] ZAECBHC 9 para 16.
[74] The court considered the validity of the SCM policy of the university in relation to Preferential Procurement Policy Framework Act 5 of 2000 and the Broad Based Black Economic Empowerment Act 53 of 2003.
[75] See MC Ching'anyi Mkandawire J. "The Duties and Responsibilities of the Registrars in a Modern Legal System" (2007) *Southern African Judges Commission/Venice Commission Registrars' Workshop* 7.
[76] PPA, s 15(1)(b).
[77] However, there is only anecdotal evidence that the PPA is being applied to these procurements. See Udeh & Ahmadu "Nigeria" in *Procurement Regulation* 154-155, for other examples.
[78] *Transnet Limited v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA).

company established by an Act of Parliament, is bound by section 217 of the Constitution and relevant procurement legislation, when it procures ICT for the government.[79]

3 2 4 5 Exempted procuring entities

No federal procuring entity in Nigeria is exempted from the application of procurement legislation and its bidder remedies; except when it undertakes defence/security procurement as discussed above.

Relevant South African legislation permits the Minister or Treasury to exempt any public entity from the application of procurement legislation.[80] It could be argued that no procuring entity is exempted from bidder remedies provided under the relevant legislation. First, bidder remedies are not contained in the PFMA and PPPFA, which empower the Minister to exempt organs of state from their provisions. Secondly, under the Treasury Regulations, it is regulation 16A that provides for bidder remedies, whereas it is regulation 16 provisions (public private partnership) that institutions may be exempted from. An implication of the foregoing is that exempted institutions under the PPPFA are liable to bidders' challenge for their procurements, in so far as it does not border on the application of the legislative provisions that they are exempted from.

3 2 5 Bidders

It is apposite to consider the status of bidders and the extent of their participation in the procurement systems, for two reasons. First, challenge proceedings are initiated and sustained primarily by bidders. Secondly, access by interested bidders to the public procurement market enhances competition, which may increase the opportunity for invoking bidder remedies.

3 2 5 1 Status of bidders

In Nigeria and South Africa, bidders may be natural (individual) or artificial persons (companies or corporate entities), with capacity to enter into contract and to sue and be sued.[81]

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[79] State Information Technology Agency Act No 88 of 1998 (as amended) (SITA Act), s 24; SITA Act: General Regulations 2005 GN R 904 in GG 28021 of 23-9-2005 (SITA Regulations), regs 3.7 and reg 7.2. See *Vox Orion v State Information Technology Agency (SOC) Ltd* 2013 ZAGPPHC 444; *New Dawn Technologies (Pty) Limited v Minister of Home Affairs* 2012 ZAGPPHC 350; also, *H R Computek (Pty) Ltd v State Information Technology Agency (Pty) Ltd* [2014] ZAGPPHC 386 para 13.

[80] PFMA s 92; Treasury Regulation reg 16.10; PPPFA s 3. Many of the public entities listed in the PFMA were specifically exempted from the provisions of the PPPFA until 7-8-2012.

[81] PPA s 16(2); Companies and Allied Matters Act (CAMA) C20 Laws of the Federation of Nigeria (LFN) 2004, ss 37 & 38(1); South Africa's Companies Act 71 of 2008 (as amended), s 19(1); also, G Lubbe & J du Plessis

However, apart from consultancy contracts, government contracts are rarely awarded to individuals, as governments prefer to deal with companies owing to: a perceived higher risk of business relations with individuals; assumed better corporate behaviour and ethical conduct by companies;[82] and, the opportunity to generate company income taxes apart from personal income taxes. Consequently, bidder remedies cases in both jurisdictions are largely instituted by corporate entities.

3 2 5 2 Government enterprises

Government enterprises in both jurisdictions may provide goods, works and services to other organs of government.[83] It is required that where these government-owned enterprises participate in a competitive procurement process that they shall be subject to the same rules that apply to all competitors in accordance with the principle of fairness, equity, and competition.[84] Thus, if a procuring entity procures from another organ of government through direct negotiation or any method, which is proven not to be *competitive*, transparent, fair, and cost-effective, a potential bidder may challenge the decision for violating applicable procurement legislation, such as section 16(1)(d-f) of the Nigerian PPA and section 217 of South African Constitution.[85] However, procuring entities may be permitted by law to negotiate contracts with government enterprises instead of using competitive bidding; as obtainable in South African municipalities by virtue of Systems Act section 80(1). Nigerian procurement regulation has no similar provision; but, such may arise as routine intra-governmental relations.[86]

"Law of Contract" in C G van der Merwe & J du Plessis (eds) *Introduction to the Law of South Africa* (2004) 243 250.

[82] There are usually administrative authorities that regulate and supervise the formation, management and dissolution of companies. In Nigeria and South Africa, it is the Corporate Affairs Commission (CAC) and the Companies and Intellectual Property Commission (CIPC), respectively. See s 7 of CAMA and s 187 of South Africa's Companies Act.

[83] By PPA s 60 "Contractor or supplier" means any potential party to a procurement contract with the procuring entity and includes any corporation, partnership, individual, sole proprietor, joint stock company, joint venture or *any other legal entity through which business is conducted*" (emphasis added). See also PPA s 16(5). Systems Act s 80(1)(a) specifically mentions that services (broadly referring to goods, works and services) may be provided by "a municipal entity, another municipality or a national or provincial organ of State".

[84] PPA S 16(1)(d)-(f); SA Constitution s 217(1); PFMA ss 38(1)(a)(iii), 51(1)(a)(iii), 76(4)(c); Treasury Regulation 16A3.2; Systems Act s 83(1)(a). See OECD/DAC *Methodology for Assessment of National Procurement Systems* (MAPS) (2006) 12; Arrowsmith *Public and Utilities Procurement* 397-398.

[85] See *Cash Paymaster Services (Pty) Ltd v CEO, SASSA NO* [2009] ZAGPPHC 169; *CEO, SASSA NO v Cash Paymaster Services (Pty) Ltd* (90/10) [2011] ZASCA 13; [2011] 3 All SA 233 (SCA); 2012 (1) SA 216 (SCA).

[86] For example, Government agencies at the various tiers can negotiate residential housing development loan services with the Federal Mortgage Bank of Nigeria (federal government-owned) under the National Housing

Nevertheless, Systems Act section 80(1) does not support the view[87] that South African organs of state at the local government level need not comply with section 217 of the Constitution when contracting municipal services to other organs of state. First, the South African Constitution, section 2, states that the "Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." Consequently, the Systems Act, section 80(1), cannot derogate from the obligation to comply with section 217 of the Constitution, as that will be invalid.[88] Secondly, section 80(1) of the Systems Act should be interpreted in harmony with or subject to section 217 of the Constitution, based on the supremacy of the Constitution. Thus, the non-application of sections 83 and 84 of the Systems Act (which contains the principles of section 217 of the Constitution, and other provisions) to contracts for municipal services awarded to other organs of state, as stipulated by section 80(1), is permissible only to the extent that it does not detract from the constitutional obligation to comply with the section 217 principles. Consequently, where a municipality negotiates with another organ of government for service delivery as envisaged under the Systems Act, it must be competitive, at least to the extent that the contract is awarded at a competitive price, and also transparent, equitable, fair, and cost-effective.[89] Thirdly, in *Cash Paymaster Services (Pty) Ltd v CEO, SASSA NO*,[90] the court rejected the argument that when an organ of state contracts with another organ for service delivery, it is the State providing for itself and accordingly obviates the need to apply the principles in section 217(1) of the

Fund. "Estate Development Loan" (2014) *The Federal Mortgage Bank of Nigeria* <http://www.fmbn.gov.ng/home/doc.aspx?mCatID=1194> (accessed 31-01-2015). Also, Nigeria National Petroleum Corporation (NNPC), which is Nigeria's state oil corporation, and Nigeria LNG Limited, 49% owned by Nigerian government, may negotiate engineering contracts with the National Engineering & Technical Company Limited (NETCO), a subsidiary company of NNPC. See M Thurber, I Emelife & P Heller "NNPC and Nigeria's Oil Patronage Ecosystem" in D G Victor, D R Hults & M C Thurber (eds) *Oil and Governance: State-Owned Enterprises and the World Energy Supply* (2011) 701 731.

[87] Bolton *Government Procurement* 192-193.

[88] Pursuant to s 172(1)(a), the courts "must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency." See *Tongoane v National Minister for Agriculture and Land Affairs* (CCT100/09) [2010] ZACC 10, 2010 (6) SA 214 (CC), 2010 (8) BCLR 741 (CC); *Doctors for Life International v Speaker of the National Assembly* (CCT12/05) [2006] ZACC 11, 2006 (12) BCLR 1399 (CC), 2006 (6) SA 416 (CC).

[89] See *CEO, SASSA NO v Cash Paymaster Services (Pty) Ltd*; [2011] 3 All SA 233 (SCA); 2012 (1) SA 216 (SCA), particularly paras 13, 25-26.

[90] [2009] ZAGPPHC 169.

Constitution. It held that the section must apply in inter-organ of state procurement agreement.[91]

3 2 5 3 Foreign contractors

In addition to local contractors, foreign companies have access to the public procurement markets of Nigeria and South Africa. However, in Nigeria, national competitive bidding and restricted bidding methods, which involve invitation of bids from only potential or selected national contractors, are used for goods and works contracts below N100 million and N1 billion respectively.[92] Contracts valued above these thresholds are to be procured through international competitive bidding (ICB), which entails advertising the tender invitation in an international publication and enlarging the minimum time for receipt of bids to enable international participation.[93] Nevertheless, where ICB is used, a margin of preference as indicated in the bidding documents, may still apply in favour of local bidders or locally manufactured products.[94] In South Africa, there is no distinction between international and national bidding;[95] meaning that foreign companies may bid for any public contract they are interested in, subject to the National Industrial Participation (NIP) Revised Guidelines 2013, the Preferential Procurement Regulations 2017 and the B-BBEE Act. Under regulation 8(2) and (4) of the Preferential Procurement Regulations, an organ of state must, in applicable cases in designated

[91] Notwithstanding that the Supreme Court of Appeal, in *CEO, SASSA NO v Cash Paymaster Services (Pty) Ltd* (90/10) [2011] ZASCA 13; [2011] 3 All SA 233 (SCA); 2012 (1) SA 216 (SCA), allowed the appeal against the decision of the High Court, it did not reverse the holding of the lower court on the application of s 217(1) of the Constitution to inter-organ of state procurement transaction.

[92] Set by the BPP pursuant to s 25(1) PPA; see FGN "Implementation of approved revised Thresholds for Service-wide Application and Special Application to the Federal Ministry of Petroleum for Expenditure related to the Nigerian National Petroleum Corporation (NNPC), Procurement Methods and Thresholds of Application and the Composition of Tenders Boards" circular SGF/OP/I/S.3/VIII/57 of 11/3/2009 available at: < http://bpp.gov.ng/index.php?option=com_joomdoc&view=documents&path=Implementation+of+Approved+Revised+Threshold+for+Service+wide+Application+and+Federal+Ministry+of+Petroleum+and+the+Composition+of+Tenders+Board+-+11th+Marc+2009.pdf> (accessed 14-10-2017).

[93] PPA s 25(2)(i); E Caborn & S Arrowsmith "Procurement Methods in the Public Procurement Systems of Africa" in G Quinot & S Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) 261 291. The 1994 UNCITRAL Model Law, art 23, contained a broad distinction between national and international methods of procurement.

[94] PPA s 34. There is no evidence that the BPP has, in accordance with the PPA s 34 (4), set through regulations the limits and the formulae for the computation of margins of preference and determination of the contents of goods manufactured locally. See Udeh & Ahmadu "Nigeria" in *Procurement Regulation*, 145. For a general discussion on the use of public procurement for social or economic objectives in some African countries (including Nigeria and South Africa), see G Quinot "Promotion of Social policy through Public Procurement in Africa" in G Quinot & S Arrowsmith(eds) *Public Procurement Regulation in Africa* (2013) 370.

[95] Bolton "South Africa" in *Procurement Regulation* 195 fn 74.

sectors, and may, in sectors not so designated, include as a specific tendering condition, that only locally produced services or goods or locally manufactured goods with a stipulated minimum threshold for local production and content will be considered.[96]

Where foreign contractors validly bid for contracts in both jurisdictions, the law requires, subject to applicable preference margins, that they shall be treated fairly and equally with local contractors.[97] Furthermore, as would be discussed in chapter 5, the wrongful use of procurement methods and misapplication of preference by procuring entities are liable to bidders' challenge.[98] Foreign contractors' participation in the procurement markets increases the potential number of bidders that may seek bidder remedies; and, equally, the existence of the bidder remedies may be an incentive for foreign contractors to participate in the markets, as it may enhance their confidence in the markets. [99]

3 3 Regulatory and other institutional frameworks

There are institutions or authorities that play a vital role in supporting the operation of bidder remedies in Nigeria and South Africa. The foremost of these institutions may be the procurement regulatory or oversight bodies, whose functions complement the law enforcement role of bidder remedies. This section takes a cursory look at the procurement regulatory bodies and other institutions involved in the operation of bidder remedies in both jurisdictions.

3 3 1 Nigeria's Bureau of Public Procurement

The Bureau of Public Procurement (BPP) is the federal procurement regulatory body. Its functions that directly affect bidder remedies include:

(i) formulating general policies and guidelines relating to public procurement;[100]

(ii) certifying relevant federal procurement prior to the award of contract;[101]

(iii) supervising the implementation of established procurement policies;[102]

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[96] Under the NIP, all public procurement with an imported content equal to or exceeding US$10 million or equivalent value are subject to an obligation on all the contractors to participate in some form of economic activity through any or a combination of the following key objectives: investment to raise production capacity and competitiveness in strategic sectors of the economy; export promotion; R&D collaboration; technology transfer; and acquisition. The B-BBEE Act is aimed at economic empowerment of hitherto disadvantaged black South Africans using, inter alia, public procurement.

[97] PPA s 16(1) d-f; SA Constitution s 217(1).

[98] PPA s 54(1); Preferential Procurement Regulations, reg 13.

[99] Zhang (2007) *PPLR* 330.

[100] Subject of the approval of the National Council on Public Procurement (NCPP); PPA s 5(a).

[101] PPA s 5(c).

[102] PPA s 5(d).

(iv) preventing fraudulent and unfair procurement and where necessary apply administrative sanctions;[103] and

(v) acting as a forum for procurement administrative review, discussed in detail in chapter 5.

Function (ii) of BPP, above, requires explication; the others appear to be self-explanatory. Certifying procurement entails submitting the comprehensive records of a bidding and evaluation exercise, to BPP before awarding the contract; following which BPP assesses the proceedings to ascertain compliance with applicable rules. If no breach is identified, BPP will issue a "certificate of no objection" to the procuring entity to award the contract to the successful bidder. If any procurement rule is identified to have been breached, the BPP will not issue the certificate. Rather, it will direct that corrective action be taken, and the contract will not be awarded until the breach is remedied. This is a form of pre-award audit, which may obviate the need for bidder remedies, where effectively applied. However, procurement certification applies only to contracts above stipulated thresholds; currently: N 100 million for goods and services, and N 1 billion for works.[104]

The BPP and its responsibilities were created by the PPA. It possesses a degree of independence and authoritative standing in Government to enable it to carry out its responsibilities, including procurement review, without interference.[105] It is only some of its functions (bidder review is not inclusive) that are subject to the approval of the National Council on Public Procurement (NCPP). It has its own fund where money appropriated to it by the National Assembly is paid; and it charges this fund to meet all its expenditure.[106] Adequate funding is necessary to ensure proper staffing and resources to keep the services of the regulatory body at the level of quality required.[107] The head of the BPP is designated "Director-General", and occupies a sufficient level within the governance structure.[108] The Director-General enjoys security of tenure as he holds office for a term of 4 years, and may be re-appointed for a further and last term of 4 years; and may only be removed from office at the

[103] PPA s 5(n). This function is complemented by its power to recommend investigation of a procurement proceeding by a relevant authority, under PPA s 53. This function as a secondary remedy to bidder remedies is discussed in chapter 8.

[104] FGN circular SGF/OP/I/S.3/VIII/57 of 11-3-2009.

[105] PPA ss 3(2) & 6. See MAPS 24.

[106] PPA 12 (1) & (2).

[107] See MAPS 24. However, the existence of a fund for the BPP does not necessarily mean that the body is adequately funded or staffed.

[108] PPA 7(2).

instance of the President, on the basis of gross misconduct or financial impropriety, fraud, and manifested incompetence proven by the NCPP.[109]

The body is not directly involved in carrying out procurement transactions of government and is not a member of procuring entities' Tenders Boards or tender evaluation committees. This is aimed at avoiding any conflict of interest in the discharge of its procurement regulatory duties. Consequently, it may not be accused of being a judge in its own case in its handling of administrative review.[110] However, BPP procures for its needs.[111] In such circumstance, it could be regarded as a *procuring entity* against which a bidder remedies proceeding may be instituted; in which case the impartiality of the BPP as a review forum may become questionable. In addition, BPP is one of the agencies under the Presidency, and its Director-General regularly attends the Federal Executive Council (FEC) meetings.[112] The FEC is a body of federal ministers, presided over by the President or the Vice-President.[113] The FEC is currently the approving authority for the award of contracts valued at N1 billion and above.[114] It has been argued that the Director-General's attendance of FEC meetings may subject him to political influence.[115] Furthermore, it is debatable whether the BPP may be fit to adjudicate over review proceedings brought against a contract awarded or approved by the FEC, considering the likelihood of bias. However, a view in support of the Director-General's attendance of FEC meetings is that it confers a high standing on him, enabling him to effectively perform his functions.[116] The head of the regulatory body needs to be of sufficient level within the governance structure to exercise its authority and responsibilities without intimidation or interference by senior government officials.[117] BPP's status and functions substantially meet the standards of a procurement regulatory authority as recommended by

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[109] PPA 7(3) & (4).

[110] It is a trite principle of law that a person shall not be a judge in his cause; expressed in a Latin maxim: "*nemo judex in causa sua"* which is one of the two pillars of natural justice directed at curtailing likelihood of bias in handling judicial or quasi-judicial functions. See *City and Suburban Transport (Pty) Ltd v Local Board Road transport, Johannesburg* 1932 WLD 100 (Hoexter 2002B, 191); *BTR Industries South Africa (pty) Ltd v Metal and Allied Workers' Union* 1992 (3) SA 673 (A); and, *Royal Netherlands Harbour Works Company B v Sama* (1991) 2 NWLR (Pt 171) 64; *Egwu v University of Port Harcourt* (1995) 8 NWLR (Pt 414) 419. See also Bolton *Government Procurement* 223-227.

[111] PPA, ss 6(3) and 12(4)(f).

[112] The letterhead paper and the website of the BPP bears "The Presidency".

[113] Constitution, ss. 144(5) and 148.

[114] FGN circular SGF/OP/I/S.3/VIII/57 of 11-3-2009.

[115] Public and Private Development Centre (PPDC) *Implementing the Nigerian Procurement Law: Compliance with the Public Procurement Act 2007* (2011) 85.

[116] 85.

[117] OECD-DAC *MAPS* 24.

MAPS.[118] Some states in Nigeria have adopted procurement regulatory bodies similar to the BPP.[119]

3 3 2 South African National Treasury

The National Treasury is established under section 5 of the PFMA, and consists of the Minister of Finance, who is the head of the Treasury, and the national department or departments responsible for financial and fiscal matters.[120] The National Treasury is the regulatory body on general public financial management in the national and provincial governments; and its authority extends also to the municipalities.[121] Some of the functions of the National Treasury that directly relate to bidder remedies include:

(i) promoting and enforcing transparency and effective management in respect of revenue, expenditure, assets and liabilities of departments, public entities and constitutional institutions;[122]

(ii) investigating any system of financial management and internal control in any department, public entity or constitutional institution;[123]

(iii) making regulations or issuing instructions to applicable institutions on framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;[124]

(iv) receiving and considering complaints regarding alleged non-compliance with the prescribed minimum norms and standards in the supply chain management system.[125]

How function (ii) above constitutes a secondary remedy is discussed in chapter 8. It is pursuant to function (iii) that the Treasury Regulations[126] were promulgated by the Minister. The Regulations provides for function (iv) above that constitutes the National Treasury into a review forum, as would be discussed in chapter 6.

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[118] 23-25.

[119] These states include: Jigawa, Lagos, Cross River.

[120] As directed by the Constitution, s 216.

[121] MFMA, s 5 & 6.

[122] PFMA, s 6(1)(g).

[123] PFMA Act, s 6(2)(e).

[124] PFMA 76(4)(c); Local Government: Municipal Finance Management Act s 168 (1).

[125] Reg.16A9.3 of the Treasury Regulations.

[126] And also, the Municipal Supply Chain Management Regulations under MFMA, which provides for bidder remedies at the municipalities.

Within the National Treasury, there is a newly established Office of the Chief Procurement Office, specifically charged with procurement regulatory functions. It took over from previous Specialists Functions Division. The functions of the Office include: managing and maintaining the regulatory environment relevant to government procurement practices; and overseeing and monitoring government sector procurement practices to ensure compliance with the regulatory framework.[127]

There are also Provincial Treasuries in the provinces, whose functions compliment the regulatory functions of the National Treasury. Although a bid adjudication panel is constituted by provincial procuring entities to award contracts, the Provincial Treasuries' departmental bid committee must approve the proposed award before it is finally awarded to the selected bidder.[128] This is similar to what obtains in Nigeria as seen above, with the same possibility that it may limit the need for bidder remedies, where effectively applied.

The National and Provincial treasuries facilitate transversal term contracts.[129] Apparently the treasuries are directly involved in procuring such contracts. [130] Thus, it may not be free from possible conflict of interest, which may affect the exercise of its bid review powers.

3 3 3 Other institutions and stakeholders

Apart from the regulatory bodies considered above, other institutions and stakeholders that play important roles in the bidder remedies systems under review include:

(i) the courts;
(ii) anti-corruption authorities and ombudsmen;
(iii) audit authorities;
(iv) ministers;
(v) intergovernmental organisations or external support agencies; and
(vi) civil society organizations.

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[127] National Treasury "Divisions- Office of the Chief Procurement Office" *National Treasury* <http://www.treasury.gov.za/divisions/ocpo/> (accessed 14-10-2017).

[128] Tenderscan "Tendering in South Africa" (21-1-2011) *Tendertopics* <http://tendertopics.tenderscan.co.za/?page_id=227> (accessed 14-10-2017); see Treasury Regulation, reg 16A6.2.

[129] Treasury Regulations, reg 16.A6.5.

[130] See SA National Treasury *2015 Public Sector Supply Chain Management Review* (2015) 47.

3 3 3 1 The courts

The court is the foremost forum for settling disputes and claiming relief for breaches of law. Bidders in Nigeria and South Africa may challenge procurement decisions or appeal procurement review decisions in the courts. The situation partly satisfies an element of effectiveness of bidder remedies: the existence of at least, "a body to hear a challenge as a first step and *a further body to hear an appeal as a second step*". In both jurisdictions, there is a hierarchical judicial system and observance of the doctrines of *stare decisis*[131] and independence of the judiciary.[132] These courts have all the inherent powers and sanctions of a court of law; and their decisions are binding on all persons and authorities to which they apply.[133] This satisfies the elements of effectiveness of bidder remedies that relate to remedial powers and decisions of a review body- this is explicated in chapter 7.

In Nigeria, the highest court is the Supreme Court of Nigeria; followed by the Court of Appeal; the Federal High Court, High Court of the Federal Capital Territory and State High Courts, and other superior courts; after which there are several inferior courts.[134] Appeals against administrative review may be instituted in the High Court; and may be further appealed up to the Supreme Court.

In South Africa, there is the Constitutional Court, which is the highest court in all matters; followed by the Supreme Court of Appeal; then, the High Courts; and the Magistrate Courts and other inferior courts.[135] Since procurement is a constitutional matter by virtue of section 217 of the Constitution, procurement cases may be pursued up to the Constitutional Court; but may not be pursued in the inferior courts since those courts do not have judicial review jurisdiction. [136]

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[131] Which translated means that a lower court must at all times hold itself bound by the decisions of a higher court until they are seen to have been overruled. See *Alao v NIDB* (1999) 9 NWLR (pt 617) 103; *Chedi v Attorney-General of the Federation* [2008] 1 NWLR (pt 1067) 166; and, *Gauteng Province Driving School Association v Amaryllis Investments (Pty) Ltd* [2011] ZASCA 237, [2012] 1 All SA 290 (SCA); and, *Ex Parte Minister of Safety and Security: In Re S v Walters* [2002] ZACC 6; 2002 (4) SA 613; 2002 (7) BCLR 663 (CC). See also: B Igwenyi *Modern Constitutional Law in Nigeria* (2006) 289; H R Hahlo & E Kahn *The South African Legal System and its Background* (1968) 214

[132] Nigerian Constitution, s 6(3), (5) & (6)(a); SA Constitution, ss 165 & 166. Also, see generally A Gordon & D Bruce "Transformation and the Independence of the Judiciary in South Africa" in Centre for the Study of Violence *After the Transition: Justice, the Judiciary and respect for the Law in South Africa* (2007) 1, available at <http://www.csvr.org.za/wits/papers/paptjust.htm> (accessed 6-10-2014).

[133] Nigerian Constitution, s 6(6)(a) & (b); SA Constitution, ss 165(5), 172 & 173.

[134] Nigerian Constitution, s 6(4)(a) & (5) & chapter VII (the Judicature).

[135] SA Constitution (as amended- 17th), ss 166-170.

[136]Quinot (2011) *PPLR* 198. The Constitutional Court has entertained numerous bidder remedies cases; some are cited in this work.

Judicial bidder remedies are discussed in chapter 7.

3 3 3 2 Anti-corruption authorities and ombudsmen

As seen in chapter 2, bidder remedies may deter and expose corruption in the procurement process; in addition to preventing and detecting breaches of procurement rules. Equally, the operations of anti-corruption authorities and ombudsmen vested with powers to investigate corruption or improper conduct in procurement may complement and act as secondary remedies, as would be discussed in chapter 8. It suffices here to present a framework of the related institutions.

The main anti-corruption authorities in Nigeria are the Economic and Financial Crimes Commission (EFCC) and the Independent Corrupt Practices and Other Related Offences Commission (ICPC).[137] Nigeria's national ombudsman is the Public Complaint Commission.[138] The jurisdiction of these authorities extends to all organs and tiers of government of Nigeria.[139] Any interested person, including bidders, procuring entities, the BPP, and Civil Society Organizations, could instigate any of the bodies to investigate suspected corruption or improper or unlawful conduct in procurement that fall within their mandate. Their investigation may lead them to prosecute or recommend the prosecution of suspects/offenders.[140]

In South Africa, corruption in procurement, among other criminal matters, may be reported to the National Director of Public Prosecutions (NDPP), who is the head of the National Prosecuting Authority (NPA), or to an Investigating Director of the NPA.[141] The NDPP may investigate or appoint an investigator to look into the matter; and he may prosecute or direct the prosecution of any person indicted, which could be a bidder or a procuring entity or their staff.[142] There is also the Public Protector, which functions as the national

[137] Established respectively by the Economic and Financial Crimes Commission (Establishment) Act No 1 of 2004 (EFCC Act); and, the Corrupt Practices and Other Related Offences Act No 6 of 2003 (Corrupt Practices Act).
[138] Established by the Public Complaint Commission Act CAP P37 LFN 2004, s 1.
[139] EFCC Act, s 6(1)(c); Anti-Corruption Act, ss 10 & 11. *Attorney-General of Ondo State v Attorney-General of the Federation* (2002) 6 SC 1, (2002) 9 NWLR (Pt 772) 222.
[140] PPA, ss 19(b)(ii), 53(1) and (5), 60; Public Complaint Commission Act, ss 5 & 7(3); Corrupt Practices Act, s10(a); EFCC Act, s 7(m).
[141] SA Constitution, s 179(1); National Prosecuting Authority Act 32 of 1998 (as amended) (NPA Act), ss 22(1), 27 & 28.
[142] SA Constitution, s 179(2); NPA Act, s 22(2) & (3).

ombudsman.[143] Its mandate includes ensuring integrity and general good governance in the management of public resources.[144] The Constitution[145] requires the Public Protector to:

(i) investigate all complaints or allegations of improper conduct (in procurement and other areas) by public officials in all spheres of government (except court decisions),

(ii) report on such improper conducts, and

(iii) take remedial actions.

The remedial actions of the above institutions that are relevant to bidder remedies are discussed in chapter 8.

3 3 3 3 Audit authorities

Audit is "[a] formal examination of an individual's or organization's accounting records, financial situation, or compliance with some other set of standards."[146] The outcome of an audit is a report containing findings on the matters examined, and recommendations on remedying any irregularities discovered. Audit of procurement transactions may expose contravention of procurement rules and lead to enforcement of the rules; thus, it has a relationship with bidder remedies. This relationship is further discussed in chapter 8.

In both jurisdictions, there is internal and external audit of public procurement transactions. Internal audit is performed by the personnel of a procuring entity being audited and supervised by the entity's accounting officer, as he is responsible for preventing unauthorized expenditure and ensuring that his entity complies with the law.[147]

In Nigeria, the BPP performs external procurement audits and submits its reports to the National Assembly bi-annually.[148] BPP's audit focuses on procuring entities' compliance with procurement rules. The Auditor-General of the Federation performs general external audit of public accounts (which includes procurement financing) of the Federation and all its ministries and departments, and courts.[149] He also recommends external auditors to statutory bodies, which his audit powers do not extend to.[150] His report is submitted annually to the National

[143] Established by the SA Constitution, s 181(1)(a); and the Public Protector Act 23 of 1994, s 1A.
[144] Public Protector *Constitutional & Legislative Mandate of the Public Protector* (2010) 4.
[145] S 182 (1) & (2).
[146] Garner *Black's Law Dictionary* 150.
[147] PPA, s 20; PFMA, ss 38-40.
[148] PPA, s 5(p).
[149] CFRN, s 85(2),
[150] Section 85(3) & (4).

Assembly to review whether public money was spent for the approved purpose and with due regard to efficiency, economy and effectiveness.[151] There is a state Auditor-General that performs similar functions in each state.[152]

The Auditor-General of South Africa (AGSA)[153] audits the accounts, financial statements and financial management of all national and provincial departments and administration and all municipalities; in addition to other functions prescribed by law.[154] In practice, all central government entities are audited every year; and a full range of audits are performed, including systems audits, financial and compliance, procurement and performance audits, etc.[155] His report, which must be made public, is submitted annually to the legislature for their oversight functions.[156] Furthermore, he may be requested to investigate an irregularity in procurement process by the head of government institution; which he may undertake and thereafter submit his report to the requesting officer, among others.[157] The audit functions of AGSA are more extensive than that of his Nigerian counterpart; however, the special procurement audit function of Nigeria's BPP affects bidder remedies more directly, as will be considered in chapter 8. In both jurisdictions, the Auditor-Generals have clear mandates and enjoy the independence commensurate with a supreme audit institution, as set by the International Organisation of Supreme Audit Institutions (INTOSAI),[158] to enable them to perform their functions effectively.[159] The functions of these audit authorities as a secondary remedy shall be analysed in chapter 8.

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[151] Section 85 (5); OAUGF "Office of the Auditor General for the Federation" (2007) *OAUGF* <http://www.oaugf.gov.ng/> (accessed 15-10-2017).

[152] CFRN, s 125.

[153] Established by SA Constitution s 181 (1)(e); Public Audit Act No 25 of 2004 (PAA) s 2.

[154] SA Constitution, s 188 (1), (2) & (4).

[155] R Quist, C Certan & J Dendura *Republic of South Africa Public Expenditure and Financial Accountability* (2008) 23.

[156] SA Constitution s188 (3).

[157] PAA, s 5. See for example, AGSA *Report of the Auditor-General of South Africa on an investigation into certain alleged procurement irregularities at the Department of Water Affairs* (2010); available at <http://www.agsa.co.za/Documents/Valueaddingauditreports/Investigationsauditreports/tabid/180/id/376/Default.aspx > (accessed 15-10-2017).

[158] INTOSAI "Folder on SAI independence" (2006) *INTOSAI* <http://www.intosai.org/documents/intosai/general.html> (accessed 15-10-2017).

[159] Quist et al *Public Expenditure* 23. See K Dye & R Stepenhurst *Pillars of Integrity: The Importance of Supreme Audit Institutions in Curbing Corruption* (1998); William-Elegbe "Corruption and Public Procurement" in *Procurement Regulation* 356.

3 3 3 4 Ministers

In both jurisdictions, ministers are the political heads of ministries and departments; and they supervise the operations of government agencies.[160] Although the ministers are not the accounting officers of their respective entities,[161] they play the following roles that affect the operation of the bidder remedies systems:

- Implementing or overseeing the implementation of the procurement decisions of their respective entities; [162]
- Approving relevant (procurement) decisions of the entities;[163]
- Making regulations or policies that relate to or may affect procurement (including bidder remedies) by the entities.[164]

However, in Nigeria, ministers' power to make policies/regulations for their entities hardly extends to procurement, as the BPP is generally responsible for making federal procurement policies/regulations.[165] The Minister of Finance plays special roles in both procurement systems. In Nigeria, he is the Chairman of NCPP; in South Africa, he is the Head of National Treasury.

3 3 3 5 Intergovernmental organisations and external support agencies

Nigeria and South Africa belong to intergovernmental organizations, and receive development assistance from external support agencies (ESAs) or international donors, some of whose procurement regulatory regimes may apply to their funded public procurements within these jurisdictions. Examples of ESAs that provide official development assistance to Nigeria and South Africa include: the World Bank; European Union (EU); United States Agency for International Development (USAID); United Nations' agencies, such as the United Nations Development Programme (UNDP) and United Nations Children's Fund (UNICEF).

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[160] See CFRN s 148 (1); Federal Civil Service Rules (Nigeria) 2008 (FCS Rules) rule 160201(a) &(c); and, "executive authority" in section 1, PFMA (SA).

[161] See 3 2 4 1 above.

[162] See PPA s 22(5); PFMA ss 63(2) & 64.

[163] See PFMA s 54(2)(b) & (d); FCS Rules 160201(c).

[164] See FCS Rules 160201(c); and PFMA s 64. Also, various legislation establishing public bodies in both jurisdictions confer regulation-making powers on ministers, which may relate to procurement. For example, the Minister of Public Service and Administration, pursuant to SITA Act s 23, made the SITA Regulations, which regulates SITA's procurement, and confers procurement review powers on the Minister (reg 6).

[165] PPA s 5(1).

South Africa has been a WTO member since 1 January 1995 and a member of the General Agreement on Tariffs and Trade (GATT) since 13 June 1948. However, South Africa is not a party to the GPA; thus, is not bound by its provisions, including its requirements on challenge procedures.[166] South Africa is a member of Southern African Development Community (SADC) and a party to the Southern African Customs Union (SACU). However, SADC does not have a government procurement-specific agreement; and, government procurement is specifically excluded from SACU's 1969 and 2002 Agreements.[167] Nevertheless, the recent free trade agreement between SACU, SADC, the Common Market for Eastern and Southern Africa (COMESA) and Eastern African Community may later lead to a government procurement obligation that may impact member-states' procurement systems, considering that COMESA has its Procurement Regulations 2009.[168] The Regulations grant right to suppliers to challenge breach of the Regulations. Similarly, Nigeria is a member of the WTO, but not a party to the GPA; thus, the limitation to the application of the GPA to Nigeria's procurement system is similar to what obtains for South Africa. Also, Nigeria belongs to the Economic Community of West African States (ECOWAS). However, ECOWAS does not have any rule or project on member-states' government procurement.[169]

Unlike the case of membership of intergovernmental bodies, the partnership of Nigeria and South Africa with ESAs has direct implications for their procurement systems, including their bidder remedies regimes. A survey by Organisation for Economic Co-operation and Development (OECD) in 2008 reveals that donors use their own procurement systems or procedures for their funded projects in Nigeria.[170] For example, procurement under the Water Supply and Sanitation Sector Reform Programme (WSSSRP), co-funded by EU/UNICEF in Nigeria, is subject to the procurement rules of the ESAs. In South Africa, some donors continue to use their own procurement systems according to an OECD 2011 survey; and between 2005 and 2010, the percentage of aid that made use of South Africa's procurement systems reduced

[166] Under art XVIII. See C McCrudden *Buying Social Justice: Equality, Government Procurement, & Legal Change* (2007) 273. However, for an assessment of South Africa's social policy in procurement against the approach to public procurement prescribed by GPA see Bolton & Quinot "Social Policies in Procurement" in *The WTO Regime on Government Procurement* 459.

[167] R Kirk & M Stern "The New Southern African Customs Union Agreement" (2003) 57 *Africa Region Working Paper* 1 11.

[168] See Bolton "South Africa" in *Procurement Regulation* 180 n 10.

[169] Udeh & Ahmadu "Nigeria" in *Procurement Regulation* 142.

[170] OECD *Survey on Monitoring the Paris Declaration: Making Aid More Effective by 2010* (2008) 41-7.

from 44 per cent to 30 per cent.[171] This is despite Nigeria's, South Africa's and some of their donors' participation[172] in the Paris Declaration on Aid Effectiveness 2005 and Accra Agenda for Action 2008 (AAA), wherein donors commit to use country systems and procedures to the maximum extent possible.[173] Progress on donors' use of countries procurement systems has been disappointing;[174] thus considering ESA's procurement regime/enforcement vis-à-vis partner countries' regimes/enforcement is apposite.

Although donors may agree to use the countries' procurement structures for their funded projects, they may still insist on applying their own procurement regulations. For example, the World Bank-financed projects are regulated by the Bank's Procurement Regulations for IPF Borrowers 2016 (World Bank Procurement Regulations); and the borrower's procurement rules/procedures may be used only if the Bank agrees.[175] The use of donors' procurement rules may result in a multiple bidder remedies regime within the jurisdictions, which may affect the domestic remedies system,[176] as would be considered in chapter 5.

3 3 3 6 Civil society organizations

There are various civil society organisations (CSOs) in Nigeria and South Africa that are involved in supporting enforcement of procurement regulation, which complements bidder

[171] OECD *Aid Effectiveness 2011: Progress in Implementing the Paris Declaration– vol II Country Chapters (South Africa)* (2011) 12.

[172] See OECD "Countries, Territories and Organisations Adhering to the Paris Declaration and AAA" *OECD* < http://www.oecd.org/dac/effectiveness/countriesterritoriesandorganisationsadheringtotheparisdeclarationandaaa.htm#> (accessed 01-02-2015)

[173] Paragraphs 21; 8 & 15 respectively. However, they recognize that use of country's systems may be infeasible, in which case participating donors commit to establish measures that strengthen instead of undermining the systems.

[174] A La Chimia "Donors' Influence on Developing Countries' Procurement Systems, Rules, Markets: A Critical Analysis" in G Quinot & S Arrowsmith (eds) *Public Procurement Regulation in Africa* (2013) 219 253-254. OECD/DAC *Aid Effectiveness 2005-10: Progress in Implementing the Paris Declaration* (2011) 3 15.

[175] Paragraph 2.4(b). However, the World Bank has been one of the major promoters of countries' procurement systems. It launched the Pilot Program for Use of Country Procurement Systems in 2008, involving 20 participating countries; but owing to criticism of its implementation, it appears to have been abandoned. La Chimia "Donor's Influence" in *Procurement Regulation* 253; C Palla & J Wood "The World Bank's Use of Country Systems for Procurement: A Good Idea Gone Bad?" (2009) 27(2) *Development Policy Review* 215. See S William-Elegbe "The Changes to the World Bank's Procurement Policy and the Implications for African Borrowers" (2014) 1 *APPLJ* 22 27-29; S William-Elegbe "The World Bank's Influence on Procurement Reform in Africa" (2013) 21(1) *AJICL* 95-119; and, generally S William-Elegbe *Public Procurement and Multilateral Development Banks: Law, Practice and Problems* (2017).

[176] Quinot "Supplier Remedies" in *Procurement Regulation* 316. On the influence of donors on African procurement regulations, see La Chimia "Donor's Influence" in *Procurement Regulation* 219.

remedies. "CSOs" refers to the set of institutions and organizations that inter-phase between the state, the business world, and the family.[177] They broadly include: nongovernmental organizations (NGOs), private voluntary organizations, peoples' organizations, community-based organizations (CBOs), civic clubs, trade unions, gender groups, cultural and religious groups, charities, social and sports clubs, cooperatives, environmental groups, professional associations, academic and policy institutions, consumer organizations, and the media.[178]

In Nigeria, certain named CSOs form part of the prescribed membership of the NCPP, which is the statutory body responsible for considering and approving policies on public procurement, among others.[179] Furthermore, two credible CSOs' representatives are statutorily required to be invited to observe federal procurement processes.[180] The two categories of CSOs to be invited are: (i) a recognized private sector professional organization whose expertise is relevant to the particular goods or service being procured; and (ii) non-governmental organisation (NGO) working in transparency, accountability and anti-corruption areas.[181] It is assumed that the representative of the professional organisation would employ his expertise to assess whether the procurement specifications and requirements would result in the procurement of goods and services that meet the industry's standards and regulations, and engender fair competition. A breach in the standard or regulation for the items being procured could be detected by the observer with the relevant expertise. The other observer representing a relevant NGO would focus on detecting corrupt practices and violation of procurement rules.

Where any breach is identified, the CSO-observers can report to any relevant agency or body for remedial actions,[182] and to their own organizations. There are three major legal limitations to the role of CSO-observers. First, the observers are not entitled to observe the bid examination and evaluation exercises.[183] Secondly, they do not intervene in the procurement

[177] U Essia & A Yearoo "Strengthening Civil Society Organizations/Government Partnership in Nigeria" (2009) 4 (9) *International NGO Journal* 368. See AO Ikelegbe "State, Civil Society and Sustainable Development in Nigeria." (2013) 7 *CPED Monograph Series* 1 5-6.

[178] Essia & Yearoo (2009) *International NGO Journal* 368. Ikelegbe (2013) *CPED Monograph Series* 8-9.

[179] PPA s 2. Concerning the current state/status of the NCPP, see KT Udeh "Nigerian National Council on Public Procurement: Addressing the Unresolved Legal Issues" (2015) 2 *APPLJ* 1.

[180] PPA s 19(b). Some states have adopted this as a legislative requirement or as a standard practice. See for example: Lagos State Public Procurement Law 2 of 2011, s 28(b); Anambra State Public Procurement Law 2011, 21(b); Jigawa State Due Process Guidelines 2014, para 4.6.

[181] PPA s 19(b)(i) & (ii).

[182] Such as the BPP, EFCC, ICPC and PCC.

[183] PPA s 32(8). However, CSO-observers may have access to records of bid examination and evaluation after the contract award- s 28(2)(a).

process.[184] Thirdly, they have no right to institute bid review proceedings, based on their findings.[185]

In South Africa, there is no statutory role given to CSOs in procurement; notwithstanding, some CSOs still support the enforcement of procurement rules. For example, Public Service Accountability Monitor (PSAM) publicizes findings from government audit reports in press releases and radio talk shows to demand remedial actions from agencies against identified breaches.[186] PSAM publishes a scorecard measuring the comparative compliance of various provincial agencies with public finance laws.[187] Also, a report of the Public Protector's investigation on an alleged improper procurement identified Ndifuna Ukwazi (a CSO) as one of the complainant.[188] Furthermore, CSOs often participate in procurement litigations in South Africa; for example, Corruption Watch acted as Amicus Curiae in *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO of SASSA (No 2)*[189] and in *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly*.[190] Also, Black Sash Trust was an applicant in *Black Sash Trust v Minister of Social Development*[191] the follow-up litigation to *AllPay (No 2)*.

CSOs' role of reporting procurement breaches and its impact on procurement enforcement within the jurisdictions are discussed further in chapter 8.

3 4 Conclusion and analysis

The discussion on procurement structures and themes are essential in comparatively assessing the bidder remedies systems under review. It may be worthwhile to give concluding analysis on these two issues presented above:

(a) the uniformity or variance in the procurement regimes at the tiers of government; and

(b) the impact of membership of intergovernmental organizations on the remedies systems.

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[184] PPA s 19(b)(ii).
[185] PPA s 54(1).
[186] V Ramkumar *Expanding Collaboration Between Public Audit Institutions and Civil Society* (2007) 4 & 5.
[187] 4 & 5.
[188] Public Protector *Yes, we Made Mistakes!: report on a investigation into the alleged improper procurement of communication services by the Department of the Premier of the Western Cape Provincial Government* 1-6-2012 Report no 1 of 2012/13, 5.
[189] [2014] ZACC 12.
[190] [2016] ZACC 11.
[191] [2017] ZACC 8, 2017 (5) BCLR 543 (CC), 2017 (3) SA 335 (CC).

3 4 1 Uniform or variant procurement regimes

As seen above, a major difference in the procurement structures of Nigeria and South Africa is that while the tiers of government in the latter have a largely uniform procurement regime, the former operates separate procurement regimes at the various tiers. These situations have implications for the remedies systems under review.

First, for South Africa, the administrative review forums (treasuries) at the national and provinces, and the municipalities, apply the same procurement legislation.[192] This may lead to a uniform review practice and procedures in South African bidder remedies system. Nigeria's PPA is applied only by federal review forums and to federal procurements. Thus, a uniform procurement review practice and procedure apply at the federal level; while, the bidder remedies systems of the various states differ.

Secondly, procurement review decisions of South African courts would easily become nation-wide judicial precedents, since in all cases it is the same legislation that the courts interpret. This is notwithstanding that there may be divergent interpretation of the courts or review forums on the purport of the legislation.[193] Since there is no uniform regime at the various tiers, decisions of Nigerian courts on federal procurement reviews may not constitute judicial precedent for states procurement reviews, except for states that have domesticated the federal procurement law.

Thirdly, South African bidder remedies regime has a nation-wide application; thus, suppliers or their legal representatives only need to be conversant with the same regime to pursue a review at the various tiers. Whereas, for Nigeria, with variant remedies regimes, suppliers would have to ascertain and follow the regime applicable in each government.

Although it appears that the uniform remedies regime of South Africa has more advantage than its Nigeria counterpart, it could be argued that since various tiers of Nigerian government have powers to establish their own bidder remedies regimes, such could be more responsive in addressing related peculiarities in each domain. For instance, it may be easier for

[192] These include Treasury Regulations; Municipal Supply Chain Management Regulations; the Systems Act.

[193] For examples, South African courts have given divergent interpretation to s 62of the Systems Act on whether disappointed bidders fall within the category of persons covered by the provision. See *Jicama 17 (Pty) Ltd v West Coast District Municipality* 2006 (1) SA 116 (C); *Loghdey v Advanced Parking Solutions CC* 2009 (5) SA 595 (C); *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008 (4) SA 346 (T). Contrast with *Loghdey v City of Cape Town* (Case 100/09) 20-1-2010; and *CC Groenewald v M5 Developments* [2010] ZASCA 47. See also G Quinot "Public Procurement" (2010) 1 *JQR* para 2 1; and Quinot (2011) *PPLR* 196.

a particular government to review or amend its regime in response to emerging local circumstances than where all tiers of government apply one regime.

3 4 2 Membership of intergovernmental organizations

The membership of Nigeria and South Africa in intergovernmental organizations does not directly impact upon their bidder remedies systems for reasons noted above. However, if Nigeria and South Africa were to be signatories to procurement rules of intergovernmental organizations, such as the GPA and COMESA Procurement Regulations, some of the implications for the remedies systems could be that: (1) the grounds for review may be enlarged to include the breach of the intergovernmental procurement rules; (2) it may lead to increase in number of review cases before the domestic forums as bidders from the member-states may invoke reviews pursuant to the intergovernmental rules; (3) the intergovernmental regime may establish a parallel review forum; and (4) the bidder remedies systems may have to adjust to conform to certain requirements of the intergovernmental procurement regulations.

In the next chapter, there shall be an analysis of the countries' procurement regulatory frameworks as they affect the respective bidder remedies systems.

Chapter 4

The Evolving Public Procurement Regulation and Remedies Systems

4 1 Introduction

Having seen the importance of public procurement regulation to the operation of a bidder remedies system and vice versa,[1] this chapter examines the procurement regulatory regimes of Nigeria and South Africa. There will, first, be a look at the periods when the countries' procurement systems were scarcely regulated, and the impact on bidder remedies. Secondly, there will be an examination of the structure and content of the current procurement regulatory regimes as they relate to bidder remedies. Thirdly, certain characteristics of these regulatory regimes that may affect the respective bidder remedies systems are identified and appraised. The relationship between the regulatory regimes and relevant elements of bidder remedies effectiveness is analysed in the concluding section.

4 2 Historical development of the regulatory regimes

As indicated above, there were periods when various aspects of public procurement were not regulated in Nigeria and South Africa (pre-2007 and 1997 respectively), before the current detailed regulation of public procurement. Those periods are examined to illustrate the point earlier made,[2] that bidder remedies would hardly apply to any aspect of procurement not subject to regulation. It also affords one a ground for speculating on what may obtain in relation to bidder remedies in jurisdictions where public procurement is barely or not regulated; while exemplifying the reform that could be undertaken in such jurisdictions. Moreover, examining the legal histories is relevant to understanding the regulatory regimes, as aspects of past legal developments remain embedded in contemporary law and society.[3]

4 2 1 Nigeria

4 2 1 1 Pre-2007 regulatory regime

There was no statutory regulation of public procurement in Nigeria until 04-07-2007.[4] During that period, extant Financial Regulations (FR), issued by the Minister of Finance,[5] stipulated

[1] In chapter 2.
[2] In 2 2 2.
[3] J Phillips "Why Legal History Matters" (2010) 41 *VUWLR* 293 295; OW Holmes *The Common Law* (2004) 1.
[4] The period in focus is from 01-10-1960 when Nigeria gained independence.
[5] Pursuant to Finance (Control and Management) Act 1958 Cap F26 LFN 2004, s 4.

the composition of Tender Boards for each procuring authority and the limits of their powers, but did not prescribe tender procedures. For example, there was no provision in the FR for: bid advertisement, rules on procurement methods, bid evaluation criteria, etc.[6] The FR is essentially an internal set of rules on financial and accounting procedures of the Federal Government, addressed to public officers.[7] Government circulars were also issued by the Minister to supplement or alter the FR.[8] Flouting the FR's and circulars' directives was a criminal offence.[9]

At the time under review, states in Nigeria had their respective procurement systems, which adapted the Federal procurement regulatory regime,[10] notwithstanding its deficiencies. These deficiencies and how they impacted on bidder remedies are analysed below.

4 2 1 2 The deficiencies

(a) Subjective discretion

The FR largely left public procurement process to the *subjective* discretion of the Tender Boards.[11] Discretion is "subjective" where the enabling legislation provides no criteria against which the decision-maker's choices can be measured.[12] The existence of discretion itself limits judicial control of the related administrative decision since the essence of discretion is to confer some flexibility on the decision-maker.[13] Moreover, "the doctrine of ultra vires is impotent" in reviewing subjective discretion.[14] Thus, reviewability of these subjective discretionary

[6] World Bank *Nigeria Country Procurement Assessment Report (CPAR)* vol I (2000) 7.
[7] Preface to the Federal Financial Regulations 2009 GN 291 in GG 72 of 27-10-2009.
[8] An example is circular No F15775 of 27-6-2001 "Policy Guidelines for Procurement and Awards of Contracts in Government Ministries and Parastatals". Related circulars may also be issued by other authorities, including the Office of the Secretary to the Government of the Federation and the Head of Civil Service of the Federation.
[9] Such as criminal insubordination. See *Federal Republic of Nigeria v Olabode George* LSHC 26-10-2009 suit no ID/71c/2008.
[10] *Nigeria CPAR* vol I 5.
[11] 5.
[12] RC Austin "Judicial Review of Subjective Discretion- at the Rubicon, Whither Now?" [1975] 28 *Current Legal Problems* 150 150; M Ginsburg "Discretionary Power in the General Welfare Assistance Act of Ontario" (1987) 2 J L & Soc Policy 1 21. See also D Galligan *Due Process and Fair Procedures: A Study of Administrative Procedures* (1997) 258-266; Arrowsmith *Government Procurement and Judicial Review*.
[13] CH Koch Jr "Judicial Review of Administrative Discretion" (1985-1986) 54 *Geo Wash L Rev* 469 471. Exercise of administrative discretion was once regarded as not reviewable: MA Fazai "Judicial Review of Administrative Discretion: Anglo-American Perspectives" (1985) 9 *Trent L J* 23 23.
[14] Austin [1975] *Current Legal Problems* 150. See Fazai (1985) *Trent L J* 25; and, *Secretary of Education and Science v Tameside MBC* (1976) 3 All ER 665 (H.L); *Padfield v Minister of Agriculture* [1968] AC 997, [1968] UKHL 1, [1968] 1 All ER 694.

procurement decisions under the FR was limited; in addition to the fact that the common law controls of discretion were rarely utilised.[15]

(b) Limited cause of action

Since various aspects of public procurement were not regulated, cause of action[16] for administrative or judicial review could hardly arise in those aspects as there was no rule to breach, except a few applicable common law principles.[17] For example, evaluation criteria were not prescribed; thus, a bidder would have no ground to challenge any criteria used.

(c) FR not secure

The Minister may revise or repeal the FR as he deemed fit.[18] Thus, provisions of the FR and the limited review grounds that their breach may have afforded subsisted at the Minister's pleasure.

(d) FR unpublicised and procurement records inaccessible

The FR and the related circulars were not publicised.[19] This presumably made suppliers uncertain about the prevailing procurement rules. Such uncertainty is a major disincentive to taking legal action.[20] The situation was compounded by the provisions of the Official Secrets Act 1962[21] and bureaucratic bottlenecks, which restricted public access to public information. Without access to procurement records, bidders could hardly prove breaches of procurement rules.

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[15] See para (e) below.

[16] Cause of action is the entire set of circumstances giving rise to an enforceable action. It is the fact or combination of facts which gives rise to a right to sue, and consists of two elements: (1) the wrongful act of plaintiff which gives the plaintiff his cause of complaint, and (2) the consequent damage. See *Savage v Uwaechia* (1972) 1 All NLR (Pt 1) 251 257; *Oduntan v Akibu* (2000) 13 NWLR (Pt 685) 446 1463 paras C-E; *Truter v Deysel* [2006] ZASCA 16, 2006 (4) SA 168 (SCA) paras 15-18. See further F Nwadialo *Civil Procedure in* Nigeria 2 ed (2000) 23-31; MM Loubser *Extinctive Prescription* (1996) 80 para 4 6 1; and the authorities cited in both books.

[17] See 2 2 2 above.

[18] The extant FR was revised in 2000 and 2009.

[19] See Williams-Elegbe (2012) *PCLJ* 341.

[20] Arrowsmith (1992) *PPLR* 117; D Pachnou "Bidder's Use of Mechanisms to Enforce EC Procurement Law" (2005) 5 *PPLR* 256 258-259; Pachnou *Effectiveness of Bidder Remedies* 156; Zhang (2007) *PPLR* 335. See G Quinot (2009) *TSAR* 443-444.

[21] Cap O3 LFN 2004, ss 1& 9; s 1 made obtaining or transmitting of a classified matter an offence, while s 9 definition of "classified matter" gave the government a wide ambit to classify documents in order to restrict access to them. Although the Nigerian Constitution, s 39(1), guarantees the right to receive information, s 39(3) validates laws reasonably justifiable in a democratic society that imposes restriction on government officials to give or receive certain information. Thus, the Official Secrets Act was not invalidated by s 39(1). However, there is now a Freedom of Information Act 2011 that has modified the operation of the former Act.

(e) No statutory bidder remedies

The FR did not vest review rights and concomitant remedies on bidders.[22] Consequently, suppliers could only pursue narrow common law remedies available in contract, tort or administrative law; which were further narrowed by the limited procurement rules.[23] This situation, in addition to the substantial time and cost of litigation, may have acted as disincentives to bidders' pursuit of the available common law remedies.[24]

To address the above deficiencies, the Nigeria CPAR of 1999[25] recommended some reforms.

4 2 1 3 Regulatory reforms

The reforms recommended were numerous;[26] but those relevant here include:

(a) the enactment of a public procurement law based on the UNCITRAL Model Law 1994; and

(b) the establishment of a public procurement regulatory body whose function shall include acting as a review forum to deal with complaints from bidders.

The Federal Government in response enacted the Public Procurement Act (PPA) in 2007, based on the UNCITRAL Model Law.[27] It introduced far-reaching reforms, among which included the establishment of the Bureau of Public Procurement (BPP), whose functions includes acting as an administrative review forum on procurement complaints. The PPA is comprehensive, and the overarching statute on Nigeria's federal procurement.[28] Notwithstanding, there is an extant FR,[29] which, among others, contains provisions on public procurement (mostly restating the

[22] *Nigeria CPAR* vol I 5.
[23] See 2 2 2; also, Williams-Elegbe (2012) *PCLJ* 341.
[24] 358; Quinot "Supplier Remedies" in *Procurement Regulation* 313; O Oko "Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria" (2005) 31 *Brook J Int'l L* 9 39–41; Pachnou (2005) *PPLR* 258-259; Pachnou *Effectiveness of Bidder Remedies* 284-285; Zhang (2007) *PPLR* 336. Only few cases on public procurement were known to have arisen in Nigeria before the enactment of the PPA. They include *CBN v System Application Products Nigeria Limited* (2005) 3 NWLR (Pt 911) 152; *Federal Republic of Nigeria v Olabode George* LSHC 26-10-2009 suit no ID/71c/2008).
[25] Undertaken jointly by the World Bank and the Nigerian Government.
[26] Contained in *Nigeria CPAR* vols I and II.
[27] UNCITRAL "Status: UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994)" (2015) *UNCITRAL* <http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html> (accessed 15-10-2015).
[28] PPA ss 15, 16(23).
[29] Financial Regulations 2009 GN 291 in GG 72 of 27-10-2009.

PPA).[30] However, its procurement provisions are subject to the PPA.[31] There is a brief review of the PPA in 4 3 2 1.

As will be seen immediately below, South Africa has a similar procurement regulatory history with Nigeria, in terms of deficiencies of the past regulatory regime and support by the World Bank towards reforming it.

4 2 2 South Africa

4 2 2 1 Pre-1997 regulatory regime

The year 1997 was when the 1996 Constitution, which stipulated regulatory principles of public procurement, came into effect.[32] Prior to 1997,[33] public procurement was centralised and various aspects of it were not regulated, notwithstanding the existence of the State Tender Board Act ("STB Act"),[34] which was intended to regulate public procurement and disposal of government assets.[35] Rather than prescribing procurement procedures; the Act merely established the State Tender Board (Board),[36] with powers to centrally undertake full procurement and disposal functions for the state, as it deemed fit.[37] Thus, procurement procedures were entirely determined by the Board. Furthermore, the Minister of Finance had powers, pursuant to sections 4(1)(h) and 13 of the Act, to make regulations to confer more powers on the Board and to achieve the objects of the Act. Consequently, regulations were made to extend the powers of the Board; for example, to debar contractors that defaulted on

[30] Chapters 29-31.
[31] PPA ss 15, 16(23); FR 2009 reg 2312.
[32] On 04-02-1997.
[33] The period in focus here is from 1961 when South Africa became a republic under the Constitution of South Africa Act 32 of 1961.
[34] Before this were the Exchequer and Audit Act 21 of 1911, replaced by Act 23 of 1956; and regulations made in terms of the Acts. However, regulation of public procurement under these Acts and their Regulations were similar to that under the STB Act. See SP Le Roux de la Harpe *Public Procurement Law: A Comparative Analysis* LLD thesis UNISA (2009) 249-268.
[35] See the long title.
[36] It also in s 2A empowered the Finance Minister to establish the Regional (Provincial) Tender Boards for the Provinces.
[37] Section 4. Its procurement function was only subject to s 4(1)(a) of the Armament Act 87 of 1964 (repealed in 1968 by the Armaments Development and Production Act 57 of 1968); and its disposal function was subject to any Act that may be made. However, the Armament Act never constrained the procurement powers of the Board, neither did any Act limit its disposal powers.

contract execution or that acted corruptly.[38] However, the Minister never made related regulations on procurement procedures.

Other pre-1996 legislation that had provisions that related to procurement included the National Supplies Procurement Act 89 of 1970, Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution),[39] and Auditor-General Act 12 of 1995.[40] National Supplies Procurement Act empowered the Minister of Trade and Industries, whenever he deems necessary or expedient for the security of the Republic, to undertake procurement without recourse to the Board and *on such conditions as he may deem fit*.[41] The Interim Constitution mandated that government procurement shall be regulated by an Act and provincial laws, providing for a procurement system that shall be fair, public, competitive, and handled by independent and impartial tender boards that record and provide reasons for their decisions.[42] In *Olitzki Property Holdings v State Tender Board*,[43] it was held that the above constitutional provisions did not constitute procurement rules; rather, they were only directives to the relevant legislatures to establish the system envisaged through statutes. Nevertheless, it was opined that the constitutional provisions could be read into the STB Act and to that extent enforceable by review or interdict.[44] The provisions did not contribute much to bidder remedies as the Interim Constitution lasted for three years characterised by political and legal transition; which did not allow sufficient time to utilize the minimal opportunity for remedies that they provided.[45] The Auditor-General Act empowered the Auditor General to certify that satisfactory management measures have been taken to ensure that resources are procured economically and utilised efficiently and effectively.[46]

The deficiencies of this regulatory regime and its impact on bidder remedies are considered below.

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[38] Amendment to Regulations of the State Tender Board Act in Terms of Section 13, 2003 (STB Regulations), reg 5(a).

[39] Repealed by SA Constitution, s 242.

[40] Repealed by s 53 of the Public Audit Act.

[41] Section 2a. See World Bank *South Africa Country Procurement Assessment Report* (CPAR) vol II (2003) 7.

[42] Section 187(1)-(4).

[43] [2001] ZASCA 51 paras 17-19, 22.

[44] Paragraph 26.

[45] The court in *Olitzki Property Holdings v State Tender Board* (698/98) [2001] ZASCA 51 did not accept that the provisions supported a claim for delictual damages premised on an allegation that the Tender Board failed to appraise the plaintiff's tender independently and impartially.

[46] Section 3(4)(d)

4 2 2 2 The deficiencies

(a) Wide discretion, limited cause of action

As seen above, the centralised procuring authorities had wide and subjective discretion in undertaking virtually all their procurement and disposal functions. This limited the reviewability of procurement decisions, as was the case in Nigeria. Equally, the lack of procurement regulation had constrained cause of action to pursue procurement review. This is illustrated by the fact that bidder remedies cases rarely arose in this jurisdiction within this period,[47] compared to the plethora of cases following post 1997 regulation of public procurement proceedings.[48]

(b) No statutory review right

No pre-1997 legislation vested review right on bidders. Thus, the only recourse for aggrieved bidders was the restricted common law remedies (usually cumbersome and costly);[49] constrained even further by the limited legislative regulation of procurement.[50]

(c) Legislative constraints

The STB Act limited bidders' review right by providing that the Board may, without giving reasons, accept or reject any offer for the conclusion of a procurement contract.[51] Moreover, the Board's proceedings and decisions were kept confidential, with disclosure at the sole discretion of the Board.[52] Absence of such reasons denied aggrieved bidders the grounds upon

[47] Such cases found by the author are: (1) 3D ID Systems (Pty) Ltd (liquidated) review application at the High Court, in 1994 against the Cape Provincial Administration (defunct) for *fraudulently awarding tender* to Nisec CC, which metamorphosed into *Minister of Finance v Gore NO* [2006] ZASCA 98, [2006] SCA 97 (RSA); (2) a 1995 case challenging an award for not complying with advertised tender conditions, which metamorphosed into *Logbro Properties CC v Bedderson NO* [2002] ZASCA 135, [2003] 1 All SA 424 (SCA); (3) *Olitzki Property Holdings v State Tender Board* [2001] ZASCA 51, which involved a judicial review application in 1995/1996 challenging a procurement decision, based on the *procurement and fundamental rights provisions of the Interim Constitution*.

[48] Author found over 500 decided bidder remedies cases. These are in addition to unreported administrative review cases.

[49] Bolton *Government Procurement* 310; Arrowsmith, Linarelli & Wallace Jr *Regulating Public Procurement* 752.

[50] See 2 2 2; de la Harpe *Public Procurement* 268; *Pretoria North Town Council v A.1 Electric Ice-Cream Factory (Pty)* Ltd 1953(3) SA 1 (A).

[51] Section 4(1)(d).

[52] Public Affairs Research Institute *The Contract State: Outsourcing & Decentralisation in Contemporary South Africa* (2014) 13-15; de la Harpe *Public Procurement Law* 268.

which to challenge the Board's decision, such as the ground of reasonableness.[53] and, nondisclosure of procurement information hampered identification of infringement. However, this statutory constraint was removed 3 years to the end of this period by the Interim Constitution, section 187(2) that mandated that reasons for procurement decisions shall be given upon request to an interested person.

Also, the STB Regulations stipulated that the Board may accept an offer which does not comply with the tender conditions set out in a tender invitation,[54] and it was not obliged to award a tender to the lowest bid.[55] These further diminished the already limited bidders' right at common law. If not for the Regulations,[56] it could have been regarded that there was an implied contract to consider the tender based on the advertised tender conditions;[57] secondly, the lowest bidder could have been entitled to sue for enforcement if invitation to bid stated that contract shall be awarded to the lowest bidder.[58]

(d) Enforcement rights restricted

Although the regulatory regime provided for enforcement mechanisms other than bidder remedies, those mechanisms were hardly of benefit to suppliers. For instance, the STB Regulations[59] empowered the Board to debar any supplier for a stipulated period for non-performance of contract or corruption; however, its effect was not to correct the damage caused but to punish the debarred supplier.[60] Also, the Board exercised subjective discretion in determining whether to debar or not; which means that the success of a supplier to judicially compel the Board to debar was slim.[61]

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[53] On how given reasons for decisions provides grounds for review see Bolton *Government Procurement* 19-20 and *Grinaker LTA Ltd v Tender Board (Mpumalanga)* [2002] 3 All SA 336 (T).

[54] Reg 5(c).

[55] Reg 5(a).

[56] Tender/solicitation documents are to be read subject to the Regulations; *Indiza Airport Management (Pty) Ltd v Msunduzi Municipality* KNHC (SA) 16-11-2012 case no 374/12.

[57] *Logbro Properties CC v Bedderson NO* [2002] ZASCA 135, [2003] 1 All SA 424 (SCA); *Blackpool and Flyde Aero Club v BC* [1990] 1 WLR 1195. See also Arrowsmith *Public and Utilities Procurement* 107-108; Craig "Developments in the Law of Tenders: Radical or Evolutionary Development?" (2003) 19 *Const LJ* 237. In *Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons* (2000) 2 LGLR 372, QBD, H Lloyd J. opined that legislative scheme is a crucial element in determining the content of an implied contract.

[58] *Harvela Investments Ltd v Royal Trust of Canada (CI) Ltd* [1986] AC 207. See 2 2 2 above.

[59] Regulation 3(5)(a).

[60] Williams-Elegbe *Corruption in Public Procurement* 34; S Williams "The Use of Exclusions for Corruption in Developing Country Procurement: The Case of South Africa" (2007) *JAL* 51(1) 1 11-12.

[61] See fn 14 above.

Procurement certification by the Auditor-General under the defunct Auditor-General Act could have served to administratively enforce value for money; but it was not designed to offer remedies or protection to suppliers. First, audits are undertaken after the conclusion of procurement proceedings and contract; thus, it may only expose but not correct irregularities. Secondly, its focus was to certify that satisfactory management measures[62] were taken, not that procurement procedures were followed. Besides, satisfactory managerial measures were not defined to enable one to determine whether they have been flouted. Thirdly, the prescribed audit functions were routine, thereby obviating the need for suppliers to instigate or compel the performance.

The above situation neither protected contractors from unfair public procurement decisions nor supported an efficient procurement system. Generally, the pre-1997 regulatory regime was out of sync with: (1) the then emerging global standardization of public procurement regulation; and (2) the political transformation in South Africa in the 1990s geared toward administrative justice and fairness. This necessitated the law reforms seen below.

4 2 2 3 Regulatory reforms

The legal reforms that followed the political transformation of South Africa extended to public procurement; starting with the enactment of the 1996 Constitution, followed by several pieces of other procurement-related legislation that will be discussed in 4 3 below. A Task Force was set up in 1995, with technical and financial support from a World Bank IDF Grant,[63] to recommend relevant procurement reforms. Its recommendations were contained in the *10 Point Interim Strategy* (1996); and later, in the *Green Paper on Public Sector Procurement Reform in South Africa*.[64] Among the recommendations were, that:[65]

(a) a "National Procurement Framework" be enacted, prescribing uniform tender procedures, policies and control measures, and preference policies; and

(b) a "National Procurement Compliance Office" be created to oversee and control the Framework's implementation. The Office would replace the state and provincial tender boards, which would relinquish their functions to procuring organs of state.

[62] These may include: market survey, budgeting, bookkeeping, and efficient stores management.
[63] US$ 487,000. See *SA CPAR I* 1.
[64] Notice 691 of 1997. Both documents provided the roadmap or template for procurement reforms in South Africa.
[65] Para 2.3.7.

However, the recommendations were not formalized and implemented in a comprehensive and coherent manner, as identified by the South African CPAR of 2003.[66] Consequently, several Acts containing procurement related matters were enacted.[67] Nevertheless, the deficiencies in the pre-1997 legislative regime have been addressed by the current legislative frameworks, as will be seen in 4 3 2 below.

4 3 The current regulatory regimes

This section first examines the various modes of regulating public procurement under the current regulatory regimes, and their implications for the remedies systems. Secondly, the current procurement legislative frameworks are reviewed, with a focus on the provisions that affect bidder remedies, especially as they address the deficiencies identified above. Pieces of legislation that touch upon public procurement in more indirect ways or that merely support bidder remedies, such as legislation on access to information, administrative justice, court procedures, etc., are not examined here. They will be treated at relevant parts in subsequent chapters.

4 3 1 Structure of the regulatory frameworks

4 3 1 1 Introduction

The subtopic relates to the various hierarchy and modes of regulating public procurement in both jurisdictions. Considering these regulatory structures are relevant for various reasons. First, it indicates the extent to which public procurement is regulated in these jurisdictions; for as will be seen below, there are statutes on procurement that are less detailed, and then regulations and other regulatory instruments that supplement and detail the provisions of the former.[68] Detailed procurement rules limit discretion of procuring officials;[69] and may consequently enhance review grounds for bidders.

Secondly, it is important that the various forms of the regulatory frameworks be differentiated, and their hierarchy firmly established to minimize inconsistencies in application.[70] This is even more significant in jurisdictions with fragmented legislative

[66] *Vol I* iii. This CPAR was a joint undertaken between the South African Government and the World Bank to study and analyse the public procurement system in South Africa existing as at 2001.
[67] The effects of this are discussed in 4 4 below.
[68] As suggested by the Guide to Enactment 49; and, OECD-DAC*MAPS* 9.
[69] See Guide to Enactment 102.
[70] OECD-DAC*MAPS* 9.

frameworks that are not structured in any systematic way, as is the case in South Africa.[71] Also, the hierarchy of procurement rules contravened may determine whether a review authority may set aside the affected decision or allow it. For example, breach of any applicable constitutional or statutory rules will most likely result in a set aside of the decision.[72] However, a breach of an administrative (or procedural) provision may escape set aside, depending on: (1) whether the enabling legislation contemplated that such breach should attract nullification of the affected decision, and (2) the materiality of the breach.[73] Furthermore, the stability of different regulatory provisions and of the entire systems depends on where in the hierarchy of the legal frameworks the different provisions are contained.[74] For instance, statutory provisions are more stable, as they are only amendable by parliamentary process, whereas regulations and others lower in hierarchy are easily modifiable by administrative authorities.

The procurement regulatory frameworks in both jurisdictions are in the form of statutes, subordinate legislation, other regulatory instruments and case law, as presented below.

4 3 1 2 Statutes

The Public Procurement Act ("PPA") is the only Nigerian federal procurement statute. Conversely, there are several statutes directly regulating public procurement in South Africa, which include: the Constitution, the Public Finance Management Act ("PFMA"), the Local Government: Municipal Finance Management Act ("MFMA"), the Preferential Procurement

[71] Quinot (2011) *PPLR* 194. See also 4 4 2 below.

[72] Nigerian Constitution s 1(1) & (3); *Osimene v Commissioner for Agriculture, Water Resources and Rural Development* [2003] 22 WRN 125; SA Constitution, ss 2 &172(1)(1): the courts "must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency." See *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO of SASSA* [2013] ZACC 42, 2014 (1) BCLR 1 (CC) paras 72, 98; *Tongoane v National Minister for Agriculture and Land Affairs* [2010] ZACC 10, 2010 (6) SA 214 (CC), 2010 (8) BCLR 741 (CC); *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11, 2006 (12) BCLR 1399 (CC), 2006 (6) SA 416 (CC).

[73] *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO of SASSA* [2013] ZACC 42 paras 28-30, 62, 72, 98: overruled the treatment of materiality in *CEO, SASSA NO v Cash Paymaster Services (Pty) Ltd* [2011] ZASCA 13, [2011] 3 All SA 233 (SCA), 2012 (1) SA 216 (SCA) para 28. See *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association* [2010] ZASCA 128 para 14; *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* 2010 (4) SA 359 (SCA). The principle referred to and the authorities are from South Africa. However, a related principle that apply to Nigeria, and to an extent, South Africa, is that where the administrative or procedural provision is merely directory, not mandatory, the non-compliance shall not be invalid or attract a set aside. See *O' Reilly v Macknian* (1983) 2 AC 237 275H -237 276A; *UNTH Management Board v Nnoli* [1994] 8 NWLR (Pt 363) 376; *CEO, SASSA NO v Cash Paymaster Services (Pty) Ltd* [2011] ZASCA 13 para 28; *contra*: *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO of SASSA* [2013] ZACC 42, 2014 (1) BCLR 1 (CC) para 30.

[74] OECD-DAC*MAPS* 9.

Policy Framework Act ("PPPFA"), the Broad-Based Black Economic Empowerment Act 53 of 2003 ("B-BBEE Act"), the Local Government: Municipal Systems Act ("the Systems Act"), and the STB Act. The fact that two or more statutes apply to the same subject-matter does not necessarily mean that there is a conflict. However, the provisions of these South African statutes do not always clearly align.[75] In the event of a conflict, the provisions of the specific as opposed to the general legislative provisions shall prevail.[76] Also, there is a presumption in law that a latter statute superseded a former statute where a conflict arises.[77] These legal principles are applicable in resolving inconsistencies among pieces of procurement legislation. The statutes are analysed respectively under 4 3 2 and 4 3 3 below.

4 3 1 3 Subordinate legislation

Subordinate procurement legislation within these jurisdictions is in the form of regulations, instructions notes, and practice notes.

(a) Regulations

These are promulgated by authorised persons (such as a Minister) or bodies (such as the BPP or the National Treasury), by virtue of an enabling statute, to provide detailed rules that will apply to related matters, or to generally give effect to the enabling statute. Regulations follow directly after statutes in hierarchy, and where there is a conflict between the two, statutes (particularly the enabling statute) prevail.[78] There are currently two federal procurement regulations in Nigeria issued by BPP, viz. Public Procurement (Consultancy Services)

[75] Quinot (2011) *PPLR* 194. See 4 4 2.

[76] Pursuant to the maxim *generalia specialibus non derogant* (meaning: universal things do not detract from specific things). P St J Langan *Maxwell on the interpretation of statutes* 12 ed (1976) 196; L Du Plessis *Re-Interpretation of Statutes* (2002) 72-73. See *Sidumo v The Rustenburg Platinum Mines* 2006 (2) SA 311 S (CC); *Minister of Defence and Military Veterans v Motau* [2014] ZACC 18, 2014 (8) BCLR 930 (CC), 2014 (5) SA 69 para 78. See also *Ibori v Ogboru* [2004] 15 NWLR [Pt 895] 154; *Matari v Dangaladima* [1993] 3 NWLR (Pt 281) 266.

[77] By virtue of the maxim *lex posterior priori derogate* or *leges posteriors priorers contrarias abrogant* (meaning subsequent laws repeal prior enacted laws to the contrary). I Currie & J De Waal (eds) T*he New Constitutional and Administrative Law* 34; J De Ville *Constitutional and Statutory Interpretation* (2000) 170; Du Plessis *Re-Interpretation* 72-73. *New Modderfontein Gold Mining Co v Tvl Provincial Administration* 1919 AD 367 397; *Joseph v City of Johannesburg* [2009] ZACC 30, 2010 (3) BCLR 212 (CC), 2010 (4) SA 55 (CC) para 66; *Olu of Warri v Kperegbeyi* [1994] 4 NWLR (Pt 339) 416; *Governor of Kaduna State v Kagoma* (1982) All NLR 162 173.

[78] *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14, 2006 (8) BCLR 872 (CC), 2006 (2) SA 311 (CC) paras 677 790; *Van Rooyen v The State* [2002] ZACC 8, 2002 (5) SA 246, 2002 (8) BCLR 810 paras 202, 210; *INEC v Balarabe Musa* (2003) 3 NWLR (Pt 806) 72, (2003) 1 SCNJ 1.

Regulations 2007 and Public Procurement (Goods and Works) Regulations 2007.[79] Procurement related regulations in South Africa include: Treasury Regulations, Municipal Supply Chain Management Regulations, and Preferential Procurement Regulations. These regulations have provisions on bidder remedies that are analysed below.

(b) Instruction and practice notes

These are subordinate legislation peculiar to South Africa, issued by the National Treasury, in the form of an official memo addressed to accounting officers/accounting authorities and heads of provincial treasuries, given them directives and addressing contemporary (and usually urgent) policy or practice matters.[80] They are issued pursuant to section 76(4)(c) of the PFMA. They may be considered lower in hierarchy than regulations since the latter are promulgated and guide all parties involved in procurement. Thus, in the case of a conflict between the two the latter may prevail. Practice/instruction notes are relevant to bidder remedies since they regulate procurement practices and procedures and may be relied upon to challenge procuring entities' non-compliant decisions. For example, in *Sgananda Consulting (Pty) Ltd v Mnambithi FET College*,[81] the unsuccessful bidder who had been called by the Bid Evaluation Committee to clarify its bid relied upon a clause: "Requests for clarification and the bidder's responses should be made in writing.": in an Instruction Note, to challenge the tender award. The court however held that the clause was not a prescriptive direction as it used the term "should", but rather a guide to good practice.[82] There is currently no instruction/practice note that deals directly with bidder remedies.

4 3 1 4 Policy instruments

These include: guidelines (also guides), procurement manuals, circulars and standard bidding documents (SBDs).[83] They are issued mostly by procurement regulatory bodies, such as the Nigerian BPP and the South African National Treasury, to supplement or operationalize

[79] Government Notice nos 78 & 79 respectively.

[80] See for example, Practice Note on Prohibition of Restrictive Practices: Certificate of Independent Bid Determination: Standard Bidding Document of 21-07-2010; Instruction Note on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management of 31-05-2011. The use of practice/instruction notes was mention in G Quinot "The Role of Quality in the Adjudication of Public Tenders" (2014) 17(3) *PER/PELJ* 1109 1121-1122, and in P Bolton "Grounds for Dispensing with Public Tender Procedures in Government Contracting" (2006) 9(2) *PER/PELJ* 1 6.

[81] (4329/14) [2014] ZAKZPHC 28 (20-5-2014).

[82] Paragraph 12-13.

[83] On the role of subordinate procurement legislation or instruments see OECD-DAC *MAPS* 16-19.

specific aspects of the law or to establish or implement policies. The issuance is largely in exercise of incidental or inherent powers of administration, not pursuant to express statutory provisions. Apart from the SBDs that are mainly directed at suppliers, the other instruments are issued to direct and guide government officials and organisations.[84] Thus, they may be considered as lower in hierarchy than the aforementioned subordinate legislation, where there is a conflict. Although they may not be regarded as legislation in the strict sense, they guide conduct, and a supplier or a procuring entity may rely on at least some of them to claim a right or establish an obligation, or to challenge or defend a procurement decision or action, respectively. Thus, they indirectly affect bidder remedies. The various kinds are briefly examined below.

(a) Guidelines (guides) and manuals

These are an important implementation tool that can help provide procurement officials with information that incorporates the law, policy and procedures and helps turn policy into practice.[85] Examples include, for Nigeria: Procurement Procedures Manual for Public Procurement in Nigeria 2011;[86] for South Africa: Implementation Guide: Preferential Procurement Regulations 2017, and, Supply Chain Management: A Guide for Accounting Officers/Authorities 2004.[87]

(b) Government circulars

They are used to disseminate procurement policy information and directives within government circles, by relevant authorities, particularly the procurement regulatory bodies in both jurisdictions.[88] They are addressed to and intended to guide actions of government officials and organisations; however, procurement related circulars are increasingly being published on the website of BPP and the National Treasury.[89] It is unclear whether a procuring entity's or its official's non-compliance with a circular directive could be a sole ground for a bidder to seek

[84] OECD-DAC *MAPS* 16.
[85] OECD-DAC *MAPS* 18.
[86] Issued by BPP.
[87] They are issued by the National Treasury. Accessible at <http://www.treasury.gov.za/divisions/ocpo/sc/Guidelines/default.aspx> (accessed 15-10-2017)
[88] In Nigeria, the Secretary to the Government of the Federation also issues procurement related circulars on behalf of the Federal Executive Council.
[89] See <http://www.bpp.gov.ng/index.php?option=com_content&view=article&id=146&Itemid=799> and <http://www.treasury.gov.za/divisions/ocpo/sc/Circulars/> (both accessed 15-10-2017) respectively.

to review and invalidate a procurement decision.[90] Considering the opinion of the court in *Sgananda Consulting (Pty) Ltd v Mnambithi FET College*,[91] it is arguable that circular directives are not, in a technical sense, prescriptive; and that they are internal administrative instructions not intended to confer rights on suppliers.[92] It is even more so in Nigeria, as the PPA provides that a complaint/challenge can arise where there is a breach of the Act, or any regulations or guidelines made under it or the provisions of bidding documents.[93] Thus, government circulars are not mentioned; although it is arguable that "guidelines" may be deemed to include circulars. The UNCITRAL Model Law, art 64(1), mentions only non-compliance with the law itself as ground for challenge; however, the regulations made pursuant to it could be deemed as part of the law. For South Africa, its procurement legislation does not mention any regulatory texts or instruments whose contravention will sustain a complaint/challenge; the Treasury Regulations only mentions "non-compliance with the prescribed minimum norm and standards",[94] which may arguably include circular directives.

(c) Standard Bidding Documents (SBDs)

In both jurisdictions, SBDs are documents issued by the respective procurement regulatory agencies, through the procuring entities, to bidders to adapt in preparing their bids. They contain documentation and clauses that govern the bidding process and are incorporated into the resultant contracts.[95] Thus, they confer rights and obligations on bidders and procuring entities to the extent that their breach is a clear ground for a review.[96] Note that as earlier

[90] In *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO, SASSA* (2014) (1) SA 604 (CC), 2014 (1) BCLR 1 (CC), [2013] ZACC 42 para 38, the court held that "*The Circular* and the Request for Proposals, *read together with* the constitutional and legislative procurement provisions, thus constituted the legally binding and enforceable framework within which tenders had to be submitted, evaluated and awarded. (Emphasis supplied).

[91] [2014] ZAKZPHC 28 (20-5-2014).

[92] In *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* [2005] ZASCA 90, 2008 (2) SA 638 (SCA), [2005] 4 All SA 487 (SCA) para 12, the court held that it was unnecessary to attach weight to or rely on an internal government document entitled 'Conditions Pertaining to Targeted Procurement', as reliance should rather be on the requirement of the PPPFA.

[93] Section 54(1).

[94] Reg 16A9.3.

[95] BPP has produced about five sets of SBDs available at BPP's website. Practice Note No SCM 1 of 2003 referred to SBDs produced by the National Treasury.

[96] *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO, SASSA* (2014) (1) SA 604 (CC), 2014 (1) BCLR 1 (CC), [2013] ZACC 42 para 38: "The Request for Proposals, all the appended documentation and the proposal in response thereto, read together, formed the basis for the formal contract…" The review sought and the decision of court in *CBN v System Application Products Nigeria Limited* (2005) 3 NWLR (Pt 911) 152 were based on the provisions of the bidding documents. See also *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* [2005] ZASCA 90, 2008 (2) SA 638 (SCA) paras 13-14.

mentioned, the PPA, section 54(1), specifically states that breach of bidding documents is a ground for challenge/review.

4 3 1 5 Case law

Principles of contract, tort/delict, administrative and constitutional law, rules of interpretation, and court procedural rules, developed by the courts are applied in procurement review. Procurement legislation may imply or prescribe judicial review of procurement decisions, but it generally leaves the courts to apply the procedures, laws, principles and remedies already known to it.[97] Consequently, the decisions of courts on procurement review have clarified, modified or supplemented the provisions of procurement legislation.[98] As noted earlier, Nigerian and South African courts share a common law heritage; so they apply largely similar case law principles in entertaining procurement litigation. Distinctions may however exist in some instances, including the use of terminologies, as seen below.

It is apposite to mention a few of the applicable case law principles that are frequently applied in procurement review cases in these jurisdictions. They are listed below (with a few bidder remedies cases and related literature in support), without attempting to discuss how they apply to procurement review, as that is undertaken in subsequent chapters.

- Contract: invitation to treat, offer and acceptance, incorporating documents by reference, etc.[99]
- Tort/delict: vicarious liability, damages for fraud and misrepresentation, etc.[100]
- Administrative Law: principles of public duty, public policy, invalidity, ultra vires, procedural unfairness, unreasonableness; mistake of fact; mandamus; interdict/injunction (South Africa/Nigeria); set aside; etc.[101]

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[97] See Guide to Enactment 235 para 35, 237.

[98] For example, *Cash Paymaster Services (Pty) Ltd v CEO, SASSA NO* [2009] ZAGPPHC 169 established that s 217 of the SA Constitution applies in inter-organ of state procurement; *Cupero Nigeria Limited v Federal Ministry of Water Resources* FHCAbj 12-6-2012 suit no FHC/Abj/CS/867/11 61-62 held that since PPA s 1(1) has established the NCPP, it is deemed to be in operation notwithstanding that it is yet to be inaugurated.

[99] *CBN v System Application Products Nigeria Limited* (2005) 3 NWLR (Pt. 911) 152 (generally); *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO, SASSA (No 2)* [2014] ZACC 12 para 56 (incorporation of documents).

[100] *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA) (generally); on damages see *Transnet Limited v Sechaba Photoscan (Pty) Limited* 2005 (1) SA 299 (SCA); *South African Post Office v De Lacy* 2009 (5) SA 255 (SCA) paras 2-5. See also Quinot (2011) *PPLR* 204-205.

[101] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) paras 54 55(a) 99 (public policy); *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO, SASSA* (2014 (1) SA 604 (CC) paras 42-43 88 (unreasonableness, procedural fairness), 17 20 26 56 (invalidity, public policy); *Eskom Holdings v The New*

- Constitutional law: doctrine of vagueness, unconstitutionality, etc.[102]
- Evidence: assessment of evidence, affidavit evidence, etc.[103]
- Procedural law: Ripeness, fair hearing, modes of commencing proceedings, locus standi, costs, judgment enforcement, etc.[104]
- Principles of interpretation: rules/maxims of interpretation.[105]

Since hierarchy of legislation was considered above, a relevant issue is where decided cases on bidder remedies stand vis-à-vis legislation. Generally, statutory provisions can alter or override existing case law.[106] However, based on judicial precedent, a subsisting judicial interpretation given to a statutory provision is regarded as the purport of that provision, even if its wordings indicate the contrary.[107] Also, by judicial review, a court can declare a statutory provision unconstitutional and therefore void; or declare a subordinate legislation invalid for

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Reclamation Group 2009 (4) SA 628 (SCA) para 11 (set aside); *Olitzki Property Holdings v State Tender Board* [2001] ZASCA 51 paras 26 31 38-39 (interdict); *Chairman, STB v Digital Voice Processing (Pty) Ltd; Chairman, STB v Sneller Digital (Pty) Ltd* [2011] ZASCA 202 paras 1 34-36 (mistake of facts); *Cupero Nigeria Limited v Federal Ministry of Water Resources* Abj FHC/Abj/CS/867/11 12-6-2012 74-76 (injunction, set aside). See also C Forsyth & E Dring "The Final Frontier: the Emergence of Material Error of Fact as a Ground for Judicial Review" in C Forsyth, M Elliot, S Jhaveri, M Ramsden & A Scully-Hill (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (2010) 245 250-257; and generally Quinot (2011) *PPLR* 193; Quinot (2009) *TSAR* 436; Quinot (2008) *Stell LR* 101.

[102] *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO, SASSA* (2014 (1) SA 604 (CC) paras 41 87-88 93 98(3) (vagueness, unconstitutionality).

[103]On evidence generally: *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO, SASSA* (2014 (1) SA 604 (CC) 44 94 98(5). Affidavit evidence: *Indiza Airport Management (Pty) Ltd v Msunduzi Municipality* (374/12) [2012] ZAKZPHC 74, [2013] 1 All SA 340; *CBN v System Application Products Nigeria Limited* (2005) 3 NWLR (Pt. 911) 152.

[104] *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO, SASSA* (2014 (1) SA 604 (CC) 26 (fair hearing), 97 (cost); *Sgananda Consulting (Pty) Ltd v Mnambithi FET College* [2014] ZAKZPHC 28 (20-5-2014) paras 24-25 (*locus standi*); ripeness: *Chairman, STB v Sneller Digital (Pty) Ltd* [2011] ZASCA 202 paras 16-23; *Integrated Remediation Limited v Federal Ministry of Environment* Abj FHC/Abj/CS/841/2010 14/11/2012. See also C Hoexter *Administrative Law in South Africa* (2007) 518-520, and Baxter *Administrative Law* 720.

[105] Some were earlier discussed.

[106] O Ogbu *Modern Nigeria Legal System* 3ed (2013) 138; Hon Lord Justice Elias *The Rise of the Strasbourgeoisie: Judicial Activism and the ECHR* paper presented at the Annual Lord Renton Lecture of Statute Law Society held at Institute of Advanced Legal Studies London, 25-11-2009 1-2 at <www.statutelawsociety.co.uk/wp-content/uploads/2014/01/EliasLectureSLS24.11.09FINAL.doc> (accessed 15-10-2017).

[107] *Ex Parte Minister of Safety and Security: In Re S v Walters* [2002] ZACC 6; 2002 (4) SA 613; 2002 (7) BCLR 663 paras 55-61. See RWM Dias *Jurisprudence* 5 ed (1985) 126-132; AO Yusuff "Legal Reasoning in Legislation" in A Sanni (ed) *Introduction to Nigerian Legal Method* (2006) 197 231-232. However, Lord Diplock had cautioned in *Carter v Bradbeer* (1975) 3 All ER 158 161, that the *ratio decidendi* of a judgment as to the meaning of particular words in a particular statutory provision should not have more than a persuasive influence on a court which is called on to interpret the same words appearing in some other statutory provision.

contravening the constitution or enabling legislation.[108] These further illustrate the importance of case law to the bidder remedies systems and to procurement law enforcement generally, as will be considered in subsequent chapters.

4 3 2 Review of relevant legislation

4 3 2 1 Nigeria

4 3 2 1 1 The Public Procurement Act

The PPA is the first public procurement statute in Nigeria, and has become a model for the states in the federation wishing to enact their own procurement laws. As an Act, alterable only by the National Assembly, it establishes a significantly secure public procurement and bidder remedies systems. The public procurement policy objectives of Nigerian federal government are captured by section 16(1)(d)-(f) thus:

> "[A]ll public procurement shall be conducted . . . in a manner which is transparent, timely, equitable for ensuring accountability and conformity with this Act and regulations deriving therefrom; with the aim of achieving value for money and fitness for purpose; in a manner which promotes competition, economy and efficiency".

The above largely corresponds with the procurement objectives suggested by the 1994 Model Law,[109] which many national procurement systems have adopted. The relationship between procurement policy objectives and bidder remedies was discussed in 2 2 3.

The PPA contains 61 detailed sections divided into thirteen parts, covering all the stages of the procurement cycle. The Act applies to all procurement of goods, works and services undertaken by the Federal Government and its agencies; and any other body that undertakes a project funded by up to 35 per cent contribution by the Federal Government.[110] Such procurement must be carried out in strict adherence to the provisions of the Act and its regulations.[111] Only minimal discretion is allowed procuring entities and their officials, as it

[108] Igwenyi *Modern Constitutional Law* 85-92; BO Nwabueze *Judicialism in Commonwealth Africa: The Role of Courts in Government* (1977) 229; van Staden "The Role of the Judiciary in Balancing Flexibility and Security" (2013) 30 *De jure* 470 483-486. *INEC v Alhaji Balarabe Musa* (2003) 3 NWLR (Pt 806) 72, (2003) 1 SCNJ 1; *Van Rooyen v The State* [2002] ZACC 8, 2002 (5) SA 246 paras 88 95 & 158.
[109] The preamble.
[110] Section 15(1).
[111] Section 16(23).

establishes detailed rules (in mandatory terms: "shall", "must") for organising, planning and implementing procurement. The discretion allowed is objective as the Act and its regulations stipulate criteria or conditions for its exercise. For example, open competitive bidding is the default procurement method;[112] alternative methods may be used but subject to the conditions stipulated.[113] Another example is that domestic preference may be accorded to local suppliers or locally manufactured or sourced items where international competitive bidding is used;[114] however, there are rules on the limits and the formula for the computation of margins of preference and determining eligibility.[115]

Having largely eliminated subjective discretion in the conduct of procurement, the PPA has enhanced reviewability of procurement decisions.[116] Furthermore, providing detailed rules that apply to all federal procurement and requiring strict adherence to these rules have enlarged possible cause of action in procurement challenge.[117] For example, in *Cupero Nigeria Limited v Federal Ministry of Water Resources*[118] the plaintiff successfully challenged the award of contract by the defendant to another bidder on the ground that the award was not to "the lowest evaluated responsive bid", as stipulated by the PPA.[119]

The PPA grants bidders a general right to challenge acts or decisions of procuring entities, by sequential administrative and judicial reviews before respective forums; [120] which is similar to what the UNCITRAL Model Law provides.[121] These levels of review are examined in detail in chapters 5 to 7.

In addition, the Act grants public access to the comprehensive procurement proceeding records;[122] similar to the Model Law.[123] Access to records is further enhanced by the Freedom

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[112] Section 16(1)(c).

[113] Part VII. On procurement methods in Nigeria, see Williams-Elegbe (2012) *PCLJ* 249-253, Udeh & Ahmadu "Nigeria" in *Procurement Regulation* 157-158. For an overview of procurement methods in some African countries (including Nigeria and South Africa), see Carborn & Arrowsmith "Procurement Methods" in *Procurement Regulation* 261-307.

[114] Sections 34(1) & (3) and 49(2).

[115] Sections 34(2)&(4) and 49(2). Public Procurement (Consultancy Services) Regulations 2007, reg 119; Public Procurement (Goods and Works) Regulations 2007, reg 106.

[116] See 4 2 1 2 (a).

[117] See 4 2 1 2 (b).

[118] FHCAbj 12-6-2012 suit no FHC/Abj/CS/867/11.

[119] Sections 16(17), 24(3), 32(2) & (3), 33.

[120] Section 54.

[121] Article 64(1).

[122] Sections 16(14), 38(1) & (2). Also, s 16(12) provides for a10 years period of retention of procurement proceeding records; similar to UNCITRAL Model law art 25(1) & (5).

[123] Article 25(2) & (3).

of Information Act 2011 ("FOIA") that obliges public institutions to provide requested record/information within 7 days; extension where necessary shall not exceed 7 days.[124] The global average timeframe for responding to information-access application is 15 working days.[125] Under the PPA, right of access, following bid opening, is exercisable after acceptance of bid or termination of procurement proceedings.[126] It is of similar effect with UNCITRAL Model Law, art 25(2) and (3). Furthermore, a disclosure of procurement proceeding records prior to award of contract may be ordered by a court.[127] The foregoing facilitate exercise of bidders' review right, as bidders rely on procurement records to identify irregularities and prove their cases. Also, publicizing of the PPA has enhanced suppliers' awareness about their statutory review right, resulting in increase of procurement challenge cases.[128]

The Act does not exempt any public procurement decision from review, in consonance with the current Model Law.[129] The Act thus improved upon the 1994 Model Law that was operative when the PPA was enacted, as it had exempted certain matters from challenge.[130] Exempting any aspect of procurement from challenge excludes the law-enforcement role of suppliers in that aspect.[131] Notwithstanding, the regulations made pursuant to the Act prescribe exemptions; presented below, and argued to be ultra vires and thus invalid to the extent of their inconsistency with the PPA.

4 3 2 1 2 The Public Procurement Regulations 2007

The Public Procurement (Consultancy Services) Regulations 2007 ("Consultancy Regulations"), and Public Procurement (Goods and Works) Regulations 2007 ("Procurement Regulations") were made in 2007; but did not receive the publicity and circulation accorded

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[124] Sections 4&6.

[125] Open Society Institute *Transparency & Silence: A Survey of Access to Information Laws and Practices in Fourteen Countries* (2006) 176.

[126] Section 32(8). This apparently is to forestall: (a) prejudicing the legitimate commercial interests of bidders; (b) impeding fair evaluation/competition. See UNCITRAL Model Law art 25(4)(a).

[127] Section 38(3). The same effect arises from combined reading of UNCITRAL Model Law art 25(3) & (4).

[128] As indicated by the number of administrative review cases filed annually before the BPP, which received 49 cases between July-September 2014: <http://www.bpp.gov.ng/index.php?option=com_joomdoc&view=documents&path=3RD+QTR+Petitions+July+-+Sept+2014.pdf> (accessed 15-10-2017). This is apart from the cases before procuring entities and courts.

[129] Guide to Enactment 82 & 230.

[130] Article 52(2). There were criticisms against the exemptions. See J Myers "Commentary on the UNCITRAL Model Law on Procurement" (1994) 22 *IBL* 253 255.

[131] See 2 3 2 3 (ii).

the PPA[132] The Regulations provide further detail to the procurement rules and procedures. Examples of detail not provided by the PPA that are contained in the Regulations include: guidelines for setting technical selection criteria in request for proposal; standard contents of terms of reference.[133] Some others include eligibility criteria for government-owned enterprises to bid; procedure for evaluating margins of preference; etc.[134] The Regulations' provision of additional procurement rules offers more review grounds, as procurement decisions would have to be assessed against these rules. For example, any reasonable formula adopted by the procuring entity for evaluating margins of preference would be valid if there are no related rules; but with the Regulations, procuring entity must either adopt the formula stipulated, or risk a challenge.

However, the provisions of the Regulations[135] on bidder remedies do not add to the bidder remedies framework established by the Act; rather they conflict with or detract from the framework in two ways. They: (1) exempted matters from review; and (b) re-enacted the PPA's provision on review right in a restrictive manner. These and other related issues are treated respectively below.

4 3 2 1 2 1 Exempted matters

The matters exempted are:

(a) choice of procurement method;

(b) rejection of all bids;

(c) returning a bid unopened because it was received after the submission deadline; and

(d) rejection of bids for not being signed and/or accompanied by a valid bid security (if required) or submitted by a bidder who was not prequalified.

Exemption (a) above is the most objectionable, considering its implications and the criticisms against a similar exemption in the 1994 Model Law.[136] This exemption creates a legal loophole for the unlawful use of restrictive procurement methods, including direct procurement. The only safeguard against such is the exercise by BPP of its oversight functions

[132] The BPP had in 2008 conducted a nation-wide public enlightenment programme on the provisions of the PPA; but the programme did not feature the Regulations. See BPP "BPP Embarks on National Sensitization" (2008) *Public Procurement Journal* 3. However, the regulations are published in the official government gazette and currently published on the BPP website: www.bpp.gov.ng.

[133] Consultancy Regulations 62, 48 & 53 respectively.

[134] Goods & Works Regulations reg 10 and annex 2, respectively.

[135] Consultancy Regulations regs 18-22, 31-35; Goods & Works Regulations regs 17-21.

[136] Article 52(2). Myers (1994) *IBL* 255.

to enforce compliance, discussed in chapter 8. However, compliance with public procurement rules will be more effective where interested suppliers can challenge the improper use of procurement methods.

Instead of exempting (b)-(d) above from challenge, the review forum should be allowed to hear and summarily dismiss the application for lacking merit, if the law has not been breached by the action complained about.[137] The Regulations should not single out those conforming procurement actions for exemption, as a bid rejected for not including required documentation, such as tax clearance, is in the same category as (b)-(d) exemptions above. Furthermore, it is ultra vires for the Regulations to exempt matters from challenge since the enabling legislation (PPA) did not expressly or impliedly permit that. Relying on *INEC v Balarabe Musa*[138] the offending provisions would be declared invalid if challenged. The summation of the Supreme Court's decision in that case is that a subordinate legislation cannot prescribe additional conditions (or exemptions) to the exercise of a right granted by the enabling legislation. Notwithstanding, the Regulations may be deemed as subsisting until declared invalid through a judicial review, based on *Madumere v Onuoha*.[139]

4 3 2 1 2 2 Restrictive re-enactment

The Regulations[140] re-enacted the PPA's provisions on bidders' review right thus:

> "Where a Bidder considers that its proposal has not been given appropriate attention and that it has or may *suffer undue disadvantage* due to a breach of an obligation *in the selection procedure* by a Procuring Entity with regards to the Act or these Regulations, the Bidder shall submit a complaint in writing…"[141]

The above is restrictive, on four grounds, compared to the related provision of the PPA that reads thus:

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[137] That is what PPA s 54(4)(b) envisages; similar in effect to art 67(6)(a) & (b) of UNCITRAL Model Law.
[138] (2003) 3 NWLR (Pt 806) 72, (2003) 1 SCNJ 1.
[139] (1999) 8 NWLR (Pt 615) 422: "The law is that any legislation once made remains valid until declared invalid by a court of competent jurisdiction. To view it otherwise and let everybody be the judge of which is and which is not valid legislation and to act accordingly is to let anarchy loose upon the land."
[140] Regulations 18 & 31 (Consultancy) (both regulations are in different parts of the Consultancy Regulations, but their provisions are the same); 17 (Goods & Work).
[141] Emphasis added.

> "A bidder may seek administrative review for any omission or breach by a procuring or disposing entity under the provisions of this Act, or any regulations or guidelines made under this Act or the provisions of bidding documents."

The four grounds are briefly analysed as follows.

(a) Under the Regulations, a bidder must prove that "its proposal has not been given appropriate attention". This is restrictive compared to the Act that only requires "any omission or breach" of relevant law or rule, for that clause of the Regulations imposes an additional requirement or onus for accessing remedies on the review applicant. Besides, it may be difficult to prove the requirement because of its vagueness.

(b) Proving a procuring entity's breach of legal obligation is not sufficient to claim remedy under the Regulations; the complainant-bidder must prove actual or possible suffering of "undue disadvantage", which arguably attracts a higher burden of proof than proving suffering of damage/injury.[142] The Act does not require such.

(c) The Regulations limit reviewable breach to those occurring "in the selection procedure"; whereas the PPA makes actionable any breach or omission of applicable rules. The aforementioned phrase under the Regulations is comparatively restrictive, since a breach occurring outside the selection procedure (for example, during procurement planning stage) may not be actionable. Whereas, under the PPA such breach would be actionable, since every stage of procurement is covered.[143]

(d) The Regulations omits breach of provisions of bidding documents as a ground of review.

It suffices to conclude here that where there is a conflict between the Regulations and the PPA the PPA shall prevail.

4 3 2 1 2 3 Other issues

Two other issues are worth mentioning in respect of the Regulations. First, the Regulations were made by BPP without the approval of the NCPP as required by the PPA.[144] This is owing to the non-inauguration of the NCPP since commencement of the Act till date.[145] It is a ground

[142] Which could be read into s 54(1) of PPA.
[143] See 7 3 1 below.
[144] Sections 2(b), 5(a).
[145] Udeh & Ahmadu "Nigeria" in *Procurement Regulation* 149; Williams-Elegbe (2012) *PCLJ* 348; AJ Osuntogun "Procurement Law in Nigeria: Challenges in Attaining its Objectives" (2012) 4 *PPLR* 139 149-152.

to invalidate the whole Regulations if subjected to judicial review; for the courts are likely to hold that there was non-observance of a mandatory procedural requirement of the enabling Act.[146] However, they may be deemed as being in force until declared invalid by the court.[147]

Secondly, there are inconsistencies in the content and application of the Regulations. (1) There is a repetition of regulations 18-22 (on bidder remedies) as 31-35 in the Consultancy Regulations. Notwithstanding, it is innocuous in legal effect. (2) The SBDs reference to the Regulations is misleading: the title and date of the Regulations are not mentioned (they just refer to: "Regulations for Goods and Works" and "Regulations for the Selection of Consulting Services"), and a few regulation numbers cited are incorrect.[148]

In *Cupero Nigeria Limited v Federal Ministry of Water Resources*[149] the bidding document adapted from the SBDs did not cite the title and year of the Regulations. In addition, it incorrectly referred to regulations 23-27 instead of 17-21 (on bidder remedies). Owing to the resultant uncertainties, the court refused to apply the Regulations in determining the case.[150]

The Regulations should be revised to align them with the PPA.

4 3 2 2 South Africa

4 3 2 2 1 The Constitution

The provisions of the Constitution that are directly related to public procurement regulation and its enforcement mechanism are sections 217, 33 and 32, in order of their relative importance. The application of section 217 to South African procurement and bidder remedies systems was discussed in chapter 3. The principles of the section, that the system must be "fair, equitable, transparent, competitive and cost-effective", constitute South Africa's procurement policy objectives;[151] which are largely similar to those of Nigeria. The relationship between these objectives and bidder remedies, discussed in 2 2 3, was given expression in *Chief Executive Officer, South African Social Security Agency NO v Cash Paymaster Services (Pty) Ltd;*[152] where the court held that once a "system" with the attributes contemplated in section

[146] See *Ajuta v Agene* (2002) 1 NWLR (pt 748) 300 CA; *Ojong v Duke* (2003) 14 *NWLR* (pt 481) 618 CA. See also *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* [1972] 1 All ER 280, [1972] 1WLR 190.

[147] *Madumere v Onuoha* (1999) 8 NWLR (Pt. 615) 422.

[148] See for example Standard Bidding Document for the Procurement of Goods 2011, Notice to Users Para 2 p i.

[149] FHCAbj 12-6-2012 suit no FHC/Abj/CS/867/11.

[150] 73-74.

[151] See Bolton "South Africa" in *Procurement Regulation* 179; Bolton *Government Procurement* 40-59.

[152] [2011] 3 All SA 23 (SCA) para 15.

217(1) is established by means of legislation or regulation, the question whether any procurement is "valid" must be answered with reference to the legislation or regulation.[153] However, this does not mean that contracts shall be concluded without regard to section 217(1).[154]

Quite relevant to bidder remedies is section 33(1), which is furthered by PAJA. It provides that:

> "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."[155]

This, in addition to the fact that public procurement is regarded as an administrative action under South African law,[156] confers a *general right of challenge* on bidders against procurement decisions that are unlawful, unreasonable and procedurally unfair. However, South African courts have opined that a cause of action for judicial review of administrative action ordinarily arises from the provisions of PAJA and not directly from section 33 of the Constitution.[157] Application of relevant provisions of PAJA to procurement challenge is considered in subsequent chapters.

Section 32 provides for right of access to information; which the Promotion of Access to Information Act 2 of 2000 ("PAIA") gives effect to. PAIA[158] allows a 30 days response time (extendable by another 30 days) to an information-access request; a timeframe longer than the

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[153] See *TEB Properties CC v MEC, Department of Health and Social Development, North West* [2011] ZASCA 243 para 14. See also Quinot (2009) *TSAR* fn 73. The PFMA, the Treasury Regulations and other legislation reviewed below are the legislation contemplated in s 217(1): see *TEB Properties CC v MEC, Department of Health and Social Development, North West* [2011] ZASCA 243 para 15.

[154] *TEB Properties CC v MEC, Department of Health and Social Development, North West* [2011] ZASCA 243 para 31. See also *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) para 8; *Municipal Manager: Qaukeni Local Municipality v F V General Trading CC* 2010 (1) SA 356 (SCA) para 11.

[155] Furthermore, s 33(2) enshrines the right to written reason for an adverse administrative action.

[156] Quinot (2011) *PPLR* 192, 195; Quinot *State Commercial Activity* 162. See also *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* 1997 2 All SA 548 (SCA); *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA); *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province* [2007] ZASCA 165; 2008 (2) SA 481 (SCA) para 4.

[157] *Mazibuko v City of Johannesburg* [2009] ZACC 28, 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC) para 73; *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14, 2006 (2) SA 311 (CC), 2006 (8) BCLR 872 (CC) paras 95-7; and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* [2004] ZACC 15; 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) paras 25-6.

[158] Sections 25&26.

global average.[159] Notwithstanding, section 32 and PAIA facilitate the identification of irregularities and adducing of evidence in exercise of bidders' review right.[160]

4 3 2 2 2 The PFMA and its Regulations

The PFMA regulates financial management in the national and provincial governments; and provides for the responsibilities of persons entrusted with financial management in those governments. Sections 38(1)(a)(iii) and 51(1)(a)(iii) mandate the accounting officers and accounting authorities of the institutions to which the Act applies[161] to ensure that the respective bodies have and maintain an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. This echoes s 217 of the Constitution, and may be viewed as not directly conferring a right on suppliers. However, the system thus established may be measured and reviewed against the principles of this section.[162]

As will be discussed in chapter 8, section 38(1)(g) is relevant to the criminal aspect of procurement rule enforcement, as it mandates accounting officers on discovery of any unauthorised, irregular or fruitless and wasteful expenditure, to immediately report, in writing, the particulars of the expenditure to the relevant treasury; and in the case of irregular expenditure involving the procurement of goods or services, also to the relevant tender board.

Section 76(4)(c) authorized the issuance of the Treasury Regulations 2005, which contains further provisions on SCM (procurement and disposal of state assets). Regulations 16A9.3 is important to bidder remedies as it obliges national and provincial treasuries to establish a mechanism for considering complaints relating to SCM; that will recommend remedial actions where non-compliance is established. This, prima facie, guarantees bidders, at an administrative level as a first step, the exercise of a general right to review, without exemption.

Below are other provisions of the Regulations that are relevant to bidder remedies.

(a) Obliging accounting officers or accounting authorities to:

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[159] For a detailed analysis of the PAIA see Bolton *Government Procurement* 238-250, and S Roling *Transparency and Access to Information in South Africa: An Evaluation of the Promotion of Access to Information Act 2 of 2000* LL.M thesis Cape Town (2007).

[160] At common law there was no general right of access to information: C Hoexter "The Current State of South African Administrative Law" in H Corder & L Van de Vijver (eds) *Realising Administrative Justice* (2002) 55; Baxter *Administrative Law* 235; Bolton *Government Procurement* 238. However, the right is critical to review; see E Atwood & M Trebilcock "Public Accountability in an Age of Contracting Out" (1996) 27(1) *The Canadian Business LJ* 1 11.

[161] See ss 1 & 3. The Minister may exempt any of the institutions from any specific provisions of the Act: s 92.

[162] Refer to 4 3 2 2 1 and authorities in fns 148 & 149 above.

- enforce rules against abuse of the SCM system (including investigation, disqualification/debarment, cancellation of corruption-tainted contract, instigating prosecution);[163]
- ensure the stipulation and disclosure of evaluation and adjudication criteria, and advertising of bids (a bidder may thus challenge their breach).[164]

(b) Stipulating procurement methods and conditions for its use; rules and procedures for disposal and letting of state assets; and ethical standards for relevant officers.[165] Their breach thus constitutes grounds for review.

4 3 2 2 3 The PPPFA and its Regulations

The PPPFA gives effect to the Constitutional provision that requires the prescription of a framework for the implementation of a preferential and affirmative procurement policy (also referred to as "horizontal policy")[166] in South Africa.[167] Reading together sections 217(3) and 2(1), of the SA Constitution and the PPPFA respectively, leaves one with the conclusion that it is compulsory for the bodies to which the Act applies to establish their related horizontal policy as prescribed under the Act and its Regulations.[168] The Act applies to "organs of state" as defined under its section 1(iii). However, pursuant to section 1(iii)(f) of the PPPFA,[169] the Preferential Procurement Regulations 2017[170] has enlarged the scope of application of both legislation by subjecting all listed public entities[171] to the prescribed preferential procurement system.[172] However, the Minister has powers to exempt any of these institutions from all or any of the provisions of the Act.[173] The PPPFA and the Regulations provide for conditions and

[163] Regulations 16A9.1, 16A9.2. These enforcement mechanisms are discussed in chapter 8.
[164] Regulation 16A6.3 (b)&(c).
[165] Regulations 16A6.4, 16A6.1, 16A6.2, 16A7, 16A8.
[166] G Quinot "Promotion of Social Policy" in *Procurement Regulation* 370; A Arrowsmith & P Kunzlik (eds) *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (2009) ch 1.
[167] See long title, and SA Constitution ss 217(2) & (3).
[168] See Bolton *Government Procurement* 269; Quinot "Promotion of Social Policy" in *Procurement Regulation* 374.
[169] Empowers the Minister of Finance to recognise institutions (other than those specified) that the Act and its Regulations shall apply to.
[170] Regulation 2 (see its footnote), retained the inclusion, by the GN R501 in GG No 34350 of 08-06-2011, of public entities listed in schedules 2 and 3 of the PFMA as institutions to which the PPPFA.
[171]Hitherto not covered. Bolton *Government Procurement* 267-269. On the impact of non-coverage of some public entities under the PPPFA and its 2001 Regulations (GN R 725 of 10-08-2001 in GG 22549), see Quinot "Promotion of Social Policy" in *Procurement Regulation* 394-395.
[172] 395 (and the authorities cited there).
[173] Section 3.

formula for evaluating tenders that are subject to applicable preference point system.[174] The 2017 Regulations realigned its preferential procurement scheme with the black economic empowerment (BEE) strategy under the B-BBEE Act.[175] The preference point system is aimed at using public procurement to protect or advance persons disadvantaged by past unfair discrimination; and to promote certain socio-economic goals.[176]

The PPPFA and the Regulations are relevant to the bidder remedies system. First, they have enlarged review grounds. A bidder entitled to the prescribed preferential policy has a right to challenge its non-observance by a procuring entity. In *Manong Associates (Pty) Ltd v Eastern Cape Department of Road and Transport*[177] the complainant, which was entitled to a preferential procurement policy (a roaster system that ensured accelerated appointments of historically disadvantaged consultants) established by the procuring entity, challenged (albeit unsuccessfully) the award of contract to another bidder (not entitled to the policy) on the ground that the entity did not observe the policy. Furthermore, any bidder can challenge a wrongful application of the preferential policy. In *RHI Joint Venture v Minister of Roads and Public Works, Eastern Cape*[178] an unsuccessful bidder was granted a set aside against an award on the grounds that the winning bidder was: (1) allocated points/weight twice (wrongful) for "expenditure on local labour and economy"; (2) allocated weight for being a "tenderer who had not been awarded a contract previously" (which was not disclosed as an award criterion).

Secondly, Regulations 13, which penalizes fraudulent claim or obtaining of B-BBEE status, constitutes an enforcement of related procurement rules.

4 3 2 2 4 The MFMA and its Regulations

The MFMA regulates the fiscal and financial management of municipalities and municipal entities.[179] It prescribes the minimum requirements, in accordance with the constitutional principles of public procurement, which the SCM regulatory systems at the local tier of

[174] Section 2 and regs 4-7, 9 & 11.

[175] BEE refers to the comprehensive policy in South Africa aimed at redressing the inequalities caused by racially discriminatory practices under apartheid. On the public procurement dimension of this policy generally, see Bolton & Quinot "Social Policies in Procurement" in *WTO Regime on Government Procurement* 459.

[176] SA Constitution s 217(2); PPPFA s 2(d). See also Quinot "Promotion of Social Policy" in *Procurement Regulation* 394 & 396-397. See also Bolton & Quinot "Social Policy in Procurement" in *WTO Regime on Government Procurement* 459.

[177] [2008] ZAEQC 2; 2008 (6) SA 434 (EqC).

[178] (769/02) [2003] ZAECHC 35 paras 27-33, 36-40 & 42. See also *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality* 2011 (4) SA 406 (KZP), [2010] ZAKZPHC 23.

[179] See long title and s 2 of Act.

government shall provide, which include: procurement procedures, bid documentation, advertisement, and contract management.[180] Pursuant to section 168, the Minister promulgated the Municipal Supply Chain Management Regulations.

The Regulations provides detailed rules on procurement and disposal for the local governments, similar to the SCM provisions of the Treasury Regulations. Most importantly, regulation 49 vests on "aggrieved persons" a general right to administrative review against the procurement decisions or actions (without exception) of a municipality or municipal entity. It further provides the commencement time-frame, appointment of adjudicator(s), sequential reference to the provincial treasury and the National Treasury, etc.[181] It does not specify the powers exercisable by the administrative adjudicator(s); but it indicates that he can "resolve" the complaint, which may be regarded as conferring on him powers to make corrective and binding review decisions.[182] In addition, regulation 50(7) preserves the right to judicial review. A detailed analysis of the administrative review mechanism provided under the Regulations is undertaken in chapters 5 and 6.

4 3 2 2 5 The Systems Act

In addition to the MFMA and its Regulations, the Systems Act regulates provision of services by municipalities through service-providers/suppliers.[183] Furthermore, section 62 vests a right of "appeal" on "a person whose rights are affected by a decision" of a municipality or its agent before designated appeal authorities; which have powers to confirm, vary or revoke an appealed decision.[184] The Act prescribes time-frames for commencing and completing the appeal proceedings.[185]

However, issues have been raised as to how the review mechanisms under this Act and the SCM Regulations align; and the extent to which section 62 remedy applies to bidders.[186] These issues are addressed in chapter 5.

[180] Chapter 11, pt 1.
[181] Regulation 50.
[182] Regulation 50(4).
[183] Sections 80-81, 83-84.
[184] Section 62(2).
[185] Section 62(1) & (5).
[186] Quinot *PPLR* (2011) 196-197.

4 4 Features of the regulatory regimes

From the review of the legislation above, certain features of the regulatory regime, which may affect the bidder remedies systems, are identifiable. These relate to the number, coherence, clarity and explicitness of the legislative frameworks; which are analysed below.

4 4 1 Nigeria

Only one statute (the PPA) regulates federal procurement. Its Regulations clearly come under it in precedence. Thus, there is no problem of identifying the law that will apply in any federal procurement case. The above feature results in coherence of the regulatory regime.[187] Although it was identified above that certain aspects of the Regulations are inconsistent with the PPA, it does not effectively undermine this coherence as the supremacy of the PPA is clearly established. In addition, the provisions of the PPA on procurement rules and review mechanisms are generally clear. Furthermore, it does not direct authorities on the procurement procedures or system to establish, rather it explicitly establishes them.

The above state of the regulatory framework makes it easy for a reasonable person to ascertain when a rule or procedure has been breached, to pursue available remedies. Particularly, the explicitness of provisions ensures that there is certainty and uniformity in the application of procurement policies; which support the operation and effectiveness of the bidder remedies system.[188]

The converse is arguably the case for South Africa.

4 4 2 South Africa

As seen above, there are several pieces of legislation that constitute the public procurement law of South Africa. It has led to the fragmentation of South African procurement policy and management,[189] which extends to the bidder remedies system.[190] The procurement regulatory regime is "far from coherent or structured in any systematic way".[191] For example, the STB Act that established a centralised procurement system still exists alongside newer pieces of

[187] This similarly obtains in states that have procurement laws.
[188] Arrowsmith *et al*, *Regulating Public Procurement* 760. Brown (1998) *PPLR* 93; Arrowsmith (1992) *PPLR* 117; Pachnou (2005) *PPLR* 258-259; Zhang (2007) *PPLR* 335; Quinot (2009) *TSAR* 443-444.
[189] *SA CPAR I* 5.
[190] Quinot (2011) *PPLR* 195.
[191] 194.

legislation that establish a decentralised system.[192] Furthermore, there are even inconsistencies amongst the legislation. For instance, the STB Act[193] allows the Board to accept or reject any tender without giving reasons, contrary to the Constitution and PAJA.[194] Also, the review mechanisms under the Systems Act section 62 and the SCM Regulations 49 do not align.[195]

The legislation largely gives direction to authorised heads of institutions to establish procurement systems, and merely prescribes the basic contents of the system; thereby allowing each entity to develop its own detailed rules and policy with legislation as guide. For example, the Treasury Regulations (which ought to give detail and effect to the PFMA) provides that relevant authorities must "develop and implement an effective and efficient supply chain management system in his or her institution"; and "ensure that bid documentation include evaluation and adjudication criteria".[196] In fact, regulation 16A9.3 only directs the treasuries to establish an administrative review mechanism. This leads to different interpretations and application of the broad directives.[197]

The foregoing causes uncertainty, which is detrimental to the effectiveness of the remedies system.

4 5 Conclusion and analysis

This chapter will be concluded by highlighting how the old regulatory regimes were contrary to the elements of effectiveness, and how the new regimes to various degrees support the related elements.

4 5 1 The old regimes vis-à-vis effectiveness

The deficiencies of the old regimes with the elements of effectiveness are comparatively analysed below.

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[192] The repeal of the STB Act was recommended in 1997 by MoF *Green Paper* para 2.3.7 25. Notwithstanding, the Act is still extant almost 20 years after. Meanwhile, the Act needs amendment to reflect current realities32-136. For example, s 4(1) still makes reference to the Armaments Act 87 of 1964 that no longer exists.

[193] Section 4(1)(d).

[194] Sections 33(1) & (2) and 5 respectively. The SA Law Reform Commission (SALRC) has recommended the review of the offending section to align it with the Constitution and PAJA: SALRC *Legislation Administered by National Treasury* (2011) 136. However, these statutes could still be read into the STB Act, pending its review.

[195] Quinot *PPLR* (2011) 196-197.

[196] Regulations 16A3.1 and 16A6.3(b).

[197] *SA CPAR I* 5.

(a) Wide discretion, grossly limited cause of action, absence of statutory provision on procurement review, procuring entities' statutory power to withhold reasons for decision, all militated against bidders' general right to procurement challenge.

(b) Statutory and practical restrictions of access to government documents did not support bidders' review right.

(c) Although the courts within the periods could review procurement decisions in a manner that meet the elements of effectiveness relating to review forums and their powers; the absence of statutorily established bidder remedies and related administrative review forums limited those dimensions of effectiveness. For instance, court's observance of strict procedures and their caseloads largely limit their ability to proceed swiftly within a reasonably short period of time. Conversely, administrative review forums could easily achieve this, and can also obviate the need for court litigation.

4 5 2 Current regimes vis-à-vis effectiveness

Owing to differences in the current regulatory regimes of Nigeria and South Africa, the analysis is undertaken separately. Note that the only elements of effectiveness considered here are those related to the legislative provisions reviewed above.

4 5 2 1 Nigeria

As seen above, the PPA grants bidders right to seek sequential administrative and judicial review of *any* omission or breach of relevant regulatory provisions by a procuring entity; and (with the FOIA) grants prompt access to procurement records. These satisfy the following elements: (a) bidders have a general right to challenge an act or decision of a procuring entity; (b) at least, a body to hear a challenge as a first step and a further body to hear an appeal as a second step; (c) there are no unlawful procurement acts or decisions exempted from review; and (d) bidders have prompt access to related procurement records.

4 5 2 2 South Africa

Section 33 of the Constitution (with PAJA), which confers a general right to administrative action that is lawful, reasonable and procedurally fair, satisfies: (a) bidders' general right to procurement challenge; and (b) non-exemption of any unlawful procurement acts or decisions from review. Section 32 of the Constitution and PAIA reasonably support the element of effectiveness requiring bidders' prompt access to related procurement records. The relevant provisions of the Treasury Regulations, Municipal SCM Regulations, and the Systems Act

grant opportunity for bidders to pursue review at an administrative forum before accessing available judicial review. This satisfies the requirement for a body to hear a challenge as a first step and a further body to hear an appeal as a second step.

An examination of the procurement administrative review mechanisms of Nigeria and South Africa follows in the next chapter.

Chapter 5

The Bidder Remedies Systems: Internal Review

5 1 Introduction

Previous chapters had presented a general view of the public procurement systems and the regulatory frameworks of Nigeria and South Africa. As aforementioned, both systems provide for administrative and judicial challenge of procurement decisions; which aligns with the element of effectiveness requiring the existence of at least *a body to hear a challenge as a first step and a further body to hear an appeal as a second step*. This chapter looks at the administrative review component, focusing on internal review.

Meanwhile, it is fitting here to first examine certain general aspects of the bidder remedies systems, since they cut across administrative and judicial remedies.

5 2 The remedies systems

The general aspects examined below include the objectives of the remedies systems, and their essential features, such as: multiple regimes, multilevel and sequential recourse, and standstill period.

5 2 1 Objectives of the systems

It is relevant to consider the objectives of the Nigerian and South African remedies systems for two reasons. First, as seen in chapter 2, the review forums may consider these objectives in resolving procurement challenge. Secondly, similar to what obtains under the UNCITRAL Model Law,[1] the objectives of these remedies systems are not explicit; thus, effort has to be made to glean them from legislation and judicial opinions.

The dual objectives of protecting the rights of bidders, and ensuring respect for the substantive procurement rules (under which correcting existing breaches and deterring future breaches could be subsumed), largely co-exist in both systems. This is deduced from the judicial authorities[2] and relevant legislation. For example, Nigeria's PPA, section 54,

[1] Also, the GPA art XVIII, and the EU Remedies regime. See Pachnou (2000) *PPLR* 63-64.

[2] On Nigeria, see *Cupero Nigeria Limited v Federal Ministry of Water Resources* FHC Abuja 12-6-2012 suit no FHC/Abj/CS/867/11, 71; and, on South Africa, the dictum of Moseneke DCJ in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 29; contra *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) para 30. See also Quinot "Supplier Remedies" in *Public Procurement* 308, and, Quinot (2008) 1 *Stell LR* 104.

empowers a bidder to seek review for any omission or breach of procurement rules. South African Treasury Regulations, 16A9.3, directs that a mechanism be established to consider complaints regarding alleged non-compliance with procurement rules; and that remedial actions (including criminal prosecution) are taken against non-compliance. Systems Act section 62 empowers a person whose rights are affected by a decision of a municipality's delegated authority to appeal against that decision. Although, it could be argued that the protection of the rights of persons affected by a municipality's decision is the focus of Systems Act, section 62, and Municipal SCM Regulations, regulation 49;[3] it is presumed that only decisions repugnant to regulations and standards would be reviewable. Nonetheless, South African courts have in a number of cases held that challenge mechanisms are primarily aimed at protecting public interest (including the integrity of the procurement system).[4]

As these objectives are only deducible from legislation and case law, determining which shall be accorded more weight where the need arises would be left to the discretion of the review forums.[5] For example, where more weight is accorded to protection of bidders' right, the forum may be inclined to granting damages to the aggrieved bidder. Whereas, if focus is on upholding the procurement rules, the forum may be more inclined to granting preventive and corrective remedies, such as interim measures and set aside.

5 2 2 Multiple remedies regimes

As noted in chapter 3, some donor organisations insist on the use of their procurement rules, some of which contain complaints mechanisms, for projects they fund in Nigeria and South Africa. Examined here is whether this practice may result in parallel challenge mechanisms or proceedings.[6]

5 2 2 1 Domestic and donor regimes

The World Bank Procurement Regulations 2016 and the EU's Procurement and Grants for European Union External Actions: a Practical Guide 2016 ("PRAG"), are examined here

[3] They mention right of aggrieved person to appeal or complain against the municipality's decision, without indicating that such is directed at remedying unlawful/non-compliant decisions.

[4] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) para 30; *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO SASSA* [2013] ZASCA 29; 2013 (4) SA 557 (SCA) paras 21 and 96, opinion upheld in *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO SASSA* [2013] ZACC 42. See also Quinot (2008) *Stell LR* 104.

[5] Examined in ch 9. See Pachnou (2000) *PPLR* 63-64; Gordon (2006) *PCLJ* 430. See also Quinot "Supplier Remedies" in *Public Procurement* 309.

[6] See Quinot "Supplier Remedies" in *Public Procurement Regulation* 315-316.

considering the quantum of development projects (governed by those instruments) funded by the respective organisations in both countries.[7] They provide challenge mechanisms that are either independent of or integrated with the domestic remedies systems.

5 2 2 2 Domestic regimes vis-à-vis World Bank Regulations

An actual or potential bidder in a World Bank's financed project may submit a procurement complaint to the Borrower or the Bank.[8] Complaints must be submitted within the timeline or the standstill period prescribed by the Regulations.[9] Where the Bank receives such complaints it forwards them to the Borrower for review.[10] The Borrower must review and resolve the complaint within seven or fifteen business days from the receipt of the complaint.[11] The decision of the reviewer is binding and final.[12] It is only where the contract is subject to the Bank's prior review that the Borrower is obliged to propose a remedial action to the Bank for its confirmation.[13] Complaints other than those covered under Annex III of the Regulations are handled by the Borrower in accordance with the rules and procedures agreed with the Bank; which may include the domestic procurement review regime.[14]

The Regulations did not specify which structure within the Borrower shall undertake the review prescribed under Annex III. Thus, the Borrower may use the structure provided under its procurement legislation. For Nigeria and South Africa, the reviewer may be the accounting officer or authority of the entity involved in implementing the project, in line with relevant national procurement legislation.[15] This is tenable, as it is internal review that the Bank's Regulations intended. These offices are well-suited to discharge this responsibility

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[7] The World Bank is financing 29 projects in Nigeria involving more than $10.5 billion; its lending programme in South Africa involves more than $18.75 billion. See The World Bank "Projects & Programs" (2017) *The World Bank* <http://www.worldbank.org/en/country/nigeria/projects> and <http://www.worldbank.org/en/country/southafrica/projects> (accessed 18-10-2017). Nigeria-EU cooperation has steadily expanded- the 10th EDF programme for Nigeria allocated €677 million for the period 2008-2013: The EU "Overview" (2017) *Nigeria* <https://ec.europa.eu/europeaid/countries/nigeria_en> (accessed 18-10-2017). The EU remains South Africa's largest development partner: The EU "Overview" (18-10-2017) *Delegation of the European Union to South Africa* <http://eeas.europa.eu/delegations/south_africa/projects/overview/index_en.htm> (accessed 18-10-2017).

[8] Paragraphs 3.26 to 3.31 and Annex XIII of the Bank's Procurement Regulations

[9] Annex III para 3.1.

[10] Annex III para 3.9(a).

[11] Respectively for challenge against the terms of solicitation documents or an exclusion from the procurement process; or against the award process. Annex III para 3.1.

[12] Paragraphs 3.6 & 3.7(c).

[13] Annex III paras 3.2-3.5, 3.7(f)-(g) & 3.9(b).

[14] Paragraph 3.30.

[15] PPA ss 16(22), 20, 54(2) (Nigeria); PFMA ss 36, 38(1), 49, 51(1); Systems Act s 62(4) (SA).

since they exercise supervisory powers over the entity's procurement. However, it is the rules and procedures prescribed by the Bank's Regulations that the reviewer must apply. The Bank's procurement challenge mechanism under Annex III is independent of the domestic remedies system. Thus, the decision is not subject to the systems' administrative review or judicial recourse.

5 2 2 3 Domestic regimes vis-à-vis EU PRAG

The PRAG prescribes procurement procedures that apply to all EU external actions financed from its general budget and the European Development Fund (EDF); except where the European Commission (EC) has authorised the contracting authority/country to use its own procurement award procedures.[16]

Paragraph 2.4.15.1 entitles aggrieved bidders to submit complaints to the contracting authority, which may be the EC, or the beneficiary-country. If the EC is the contracting authority, the EC officer that took the contested decision shall within 15 working days treat the complaint and give a decision; which is appealable to the relevant EC's geographical director in headquarters.[17] Conversely, no time-limit or procedure is provided for review where the beneficiary-country is the contracting authority. In this case, the beneficiary-country's administrative review mechanism may apply.

Also, paragraph 2.4.15.3 of the PRAG entitles an aggrieved bidder to file an "ordinary action"; which contextually is a reference to judicial recourse. If the EC is the contracting authority, the action shall be before the EU General Court, in accordance with the Treaty on the Functioning of the European Union.[18] This action could proceed without first exhausting this EC's administrative review.[19] Where the beneficiary-country is the contracting authority, the judicial recourse shall be in accordance with conditions and deadlines prescribed by applicable national legislation. In this case, administrative remedies shall first be exhausted in accordance with applicable Nigerian and South African legislation.[20]

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[16] Paragraph 1.1.

[17] Paragraph 2.4.15.1 In addition, any EU citizen or resident may complain to the European Ombudsman against any maladministration (in procurement) by any EU institutions: para 2.4.15.2.

[18] Paragraph 2.4.15.3.

[19] Paragraph 2.4.15.3 states: "[A bidder] may *also* file ordinary actions" (emphasis added); and para 2.4.15.1 (which provides for administrative reconsideration) states that it is "without prejudice to other remedies".

[20] See 5 2 3 below.

5 2 2 4 Parallel and divergent?

The complaint mechanisms under the World Bank's Guidelines and the EU PRAG may not result in duplicate and divergent remedies systems in Nigeria and South Africa,[21] owing to two factors. Firstly, the World Bank and EU PRAG clearly provide when and how the domestic remedies regimes shall apply to procurement funded by the respective organisations. Secondly, it is these organisations' rules that generally apply to their funded projects. In that circumstance, they override the country's procurement rules and remedies.[22] Where a complaint is filed before a domestic forum contrary to the donors' rules, the forum could decline jurisdiction;[23] for the countries are bound by the loan/grant or funding agreement, and bidders are bound by the terms of bid, including the donors' rules.[24]

5 2 3 Multilevel and sequential recourse

In both countries, administrative and judicial remedies are pursued before hierarchically designated forums; and remedies at a lower level must generally be exhausted before recourse to a higher level. This is based on the following.

(a) The strict rule that internal remedies must be exhausted before recourse to the courts;[25] unless "exceptional circumstances" justify bypassing internal remedies for a judicial review.[26] However, there are South African cases where judicial review applications, not merely interim interdict,[27] were allowed; notwithstanding that administrative remedies (particularly, Systems Act section 62 appeal) were not exhausted.[28] This is apparently due to the respondents' failure to raise objection.

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[21] See Quinot "Supplier Remedies" in *Public Procurement Regulation* 316-317, on the problem of duplicate and divergent remedies systems that may result from the application of the procurement rules of donor or intergovernmental bodies to their funded national procurement.

[22] World Bank Regulations paras 1.2; and PRAG para 1.1.

[23] Contra: Quinot "Supplier Remedies" in *Public Procurement Regulation* 316.

[24] See *CBN v System Application Products Nigeria Limited* (2005) 3 NWLR (Pt. 911) 152; and *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO of SASSA* 2014 (1) BCLR 1 (CC) paras 38.

[25] See (Nigeria): *Ofscon Nig Ltd v Min of Niger Delta* Affairs FHC 21-03-2012 suit no FHC/Abj/CS/315/2011; *A.C Egbe Nig Limited v DG BPP* FHC 21-07-2010 suit no FHC/B/CS/116/2010; (South Africa): PAJA s 7(2)(b); *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality* [2014] ZAECGHC 55, [2014] 3 All SA 560; *Koyabe v Minister for Home Affairs* 2009 (2) BCLR 1192 (CC) Paras 35-40, 46-49; *South African Municipal Workers Union v City of Cape Town* [2005] ZAWCHC 39 para 163.

[26] PAJA s 7(2)(c).

[27] Allowable before internal remedies are exhausted, to maintain status quo.

[28] See *Compass Waste Services (Pty) Ltd v Chairperson Northern Cape Tender Board* [2005] ZANCHC 4, [2005] 4 All SA 425 (NC); *Actaris South Africa (Pty) Ltd v Chairman of the Tender Committee* [2007] ZAFSHC 136; *Alexander Maintenance and Electrical Services CC v Nyandeni Local Municipality* [2012] ZAECMHC 10.

(b) Legislation stipulating a sequence of review or appeal. The Nigerian PPA stipulates that procurement challenge is first to the procuring entity; then to the BPP; and from the BPP to the Federal High Court.[29] The Constitutions of Nigeria[30] and South Africa[31] respectively stipulate how appeals shall lie from one court to another. This is significant, as procurement cases could be pursued up to the respective countries' highest courts.

5 2 4 Standstill period

No Nigerian or South African legislation provides for a standstill period. This is arguably a lacuna, considering that a standstill period forestalls the execution of contract which may prejudice a review.[32] However, the lacuna appears innocuous owing to two factors in both jurisdictions. Firstly, when a challenge application is filed, the procurement may be suspended automatically or by order of the forum, pending the determination of the case.[33] Secondly, concluded contracts can be reviewed and invalidated.[34]

Nonetheless, it is preferable to provide for a standstill period, as review of concluded contracts entails additional complications and costs.[35] Besides, where the contract obligations are nearly-fully or fully performed, procurement review becomes impracticable and academic.[36]

Interestingly, certain procurement practice and decisions of courts in South Africa could set up a standstill period. Some municipalities usually notify bidders that awards would not become effective until the expiry of the 21-day period allowed for bringing appeals under

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[29] PPA, s 54(2), (3) & (7).

[30] Chapter VII, see particularly "appellate jurisdiction" of the courts.

[31] Chapter 8.

[32] See 2 3 2(v) above; Quinot "Supplier Remedies" in *Public Procurement* 318-319. On the rationale for introducing a mandatory standstill period in EU procurement law see PrieB & Friton "Designing Effective Challenge Procedures" in *WTO Regime on Government Procurement* 511 526-528.

[33] Discussed in 5 3 9, 6 8, and 7 8.

[34] See Quinot "Supplier Remedies" in *Public Procurement Regulation* 318; Quinot *PPLR* (2011) 202-203. Also, *Cupero Nigeria Limited v Federal Ministry of Water Resources* FHC Abuja 12-6-2012 suit no FHC/Abj/CS/867/11; *Eskom Holdings v The New Reclamation Group* 2009 (4) SA 628 (SCA); *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO of SASSA* [2013] ZACC 42.

[35] Discussed further in chapter 9. See Guide to Enactment to Model Law 232 para 20.

[36] See SA: *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* [2005] ZASCA 90, 2008 (2) SA 638 (SCA), [2005] 4 All SA 487 (SCA) paras 25, 27-30; *Aurobindo Pharma (Pty) Ltd v Chairperson, State Tender Board* [2010] ZAGPPHC 51 para 7; *Sebenza Kahle Trade CC v Emalahleni Local Municipal Council & Another* [2003] 2 All SA 340 (T). Nigeria: *Badejo v Federal Ministry of Education* (1996) 8 NWLR (part 464) 15 40-41; *Ogbonna v President Federal Republic of Nigeria* (1997) 5 NWLR (Pt 504) 281 187.

section 62 Systems Act.[37] This becomes binding as a term of the award. Its weakness is that municipalities may easily jettison the practice, since they are not obliged to it. This leads to uncertainty about its application,[38] which is allayed when municipalities enshrine this *standstill* in their SCM policy.[39] In *Steenkamp NO v Provincial Tender Board, Eastern Cape*,[40] the Constitutional Court held that a successful bidder should wait to see if the award will not be challenged before carrying out the contract. According to Quinot,[41] this effectively results in, or at least judicially sanctions, a standstill period between award of the tender and the expiry of the timeframe for judicially challenging the award.[42] The weakness of this is that the period of standstill is not specified; also, it is not aimed at avoiding conclusion of contract before review.

Having looked at the above general aspects of the remedies systems, attention is now turned to the core of this chapter- administrative review, with focus on internal review.

5 3 Internal Administrative review

Procurement administrative review in Nigeria and South Africa takes two forms: internal and external review. Internal review is examined here, while external review is treated in the next chapter.

Internal review in both countries entails a procuring entity receiving and considering complaints against its procurement decisions or actions, with a view to correcting identified breaches, as required by law. The UNICITRAL Model Law[43] provides for the same; which it refers to as "reconsideration".[44] Under the GPA[45] it is a discretionary first step to resolve complaint by "consultation" between the aggrieved supplier and the procuring entity.[46]

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[37] See *Syntell (Pty) Ltd v City of Cape Town* [2008] ZAWCHC 120; *Total Computer Services (Pty) Limited v Municipal Manager Potchefstroom Local Municipality* [2007] ZAGPHC 239; 2008 (4) SA 346 (T) para 62.
[38] As seen in *Loghdey v City of Cape Town* (100/09) [2010] ZAWCHC 25.
[39] See The City of Cape Town's Supply Chain Management Policy 2013 clause 245.
[40] 2007 (3) SA 121 (CC) paras 51-52.
[41] G Quinot "Worse than Losing a Government Tender: Winning It" (2008) 19 *Stellenbosch Law Review* 101, 113-114; and Quinot "Supplier Remedies" in *Public Procurement Regulation* 318-319.
[42] A maximum of 180 days after notification of the decision under s 7(1) PAJA, but it may be extended either by agreement of parties or by the court in terms of s 9 PAJA.
[43] Articles 64(2) & 66.
[44] See also, EU Directive 2007/66/EC of 11/12/2007 (Remedies Directive) art 1(5).
[45] Article XVIII (2).
[46] See Zhang (2009) *PPLR* 201 109; Dalby "Remedies for Infringement" in *Public Procurement in Europe* 248.

Also, internal review mechanism may be established as a corporate policy by entities which legislation on internal review does not cover. Such existed in some states of Nigeria,[47] before related legislation was made. A few South African national entities provide this internal remedy, as the legislation on internal review applies only to local governments.[48] The following are shortcomings of this form of internal review: (a) it is not obligatory for the procuring entity to review; (b) the remedies are not binding, since it is not a legal right; except the solicitation/bid document includes the review as a term of bid.[49] Since this mechanism is limited and peculiar to each entity concerned, the outline above suffices here.

The components of internal review in Nigeria and South Africa, such as the applicable laws, the forum, available remedies, among others, are examined below. Some of these components are compared with related elements of effective remedies systems.

5 3 1 Enabling legislation

This subsection reviews the legislative provisions that establish the respective internal review mechanisms, to identify the scope of the review right created.

5 3 1 1 Nigeria

The PPA, section 54(2) established internal review for Nigeria's federal procurement system. It provides that:

> "A complaint by a bidder against a procuring or disposing entity shall first be submitted in writing to the accounting officer (of the procuring entity) …"[50]

This unequivocally makes internal review the first recourse for an aggrieved bidder. Consequently, the higher review forums could refuse to entertain a challenge if the bidder had failed to explore internal review.[51]

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[47] Include: Jigawa, Cross River, and Kano.

[48] For example, Transnet (a national corporation), provides for lodging complaints to the Chief Procurement Officer (for contracts below R5,000,000); or to the independent Procurement Ombudsman (for contracts above R5,000,000), according to its Procurement Ombudsman Terms of Reference 2010 (available at <http://www.transnet.net/Pages/Ombudsman.aspx> accessed 21-10-2017).

[49] See *Ultimate Heli (Pty) Limited v Chairperson: Transnet National Authority Acquisition Council* (80163/2014) [2014] ZAGPPHC 931 18; *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO of SASSA* 2014 (1) BCLR 1 (CC) paras 38 & 40; and *CBN v System Application Products Nigeria Limited* (2005) 3 NWLR (Pt. 911) 152.

[50] Emphasis added.

[51] *Ofscon Nig Ltd v Min of Niger Delta* Affairs FHC 21-03-2012 suit no FHC/Abj/CS/315/2011; *A.C Egbe Nig Limited v DG BPP* FHC 21-07-2010 suit no FHC/B/CS/116/2010.

5 3 1 2 South Africa

Section 62 of Systems Act and regulation 49 of the Municipal SCM Regulations established the South African internal review mechanisms. These laws, as noted in 5 3 1 above, apply only to local governments; thus, these mechanisms do not extend to national and provincial governments' procurement.

5 3 1 2 1 Municipal Systems Act, section 62

Section 62(1) provides that:

> "A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21days of the date of the notification of the decision."

An "appeal against that decision to… the municipal manager" clearly established internal review mechanism within the municipalities (procuring entities). Until the decision of the High Court in *Loghdey v City of Cape Town*,[52] it was taken for granted that the above provision afforded unsuccessful tenderers the right to internal appeal against the award decision of a municipality's delegated authority.[53] In *Loghdey*,[54] the court relied on *Reader v Ikin*[55] to hold that there was no viable appeal remedy under section 62 for an unsuccessful tenderer, as the appeal was only for "the person who has asked or applied for the decision in question". Relying on *Reader* was erroneous, since that case was a complaint by a neighbour against the municipality's grant of a building permit to an applicant; where the court held that section 62 appeal was only available to the applicant (for instance, if the permit was denied); not the complainant who was a third party to the application. Conversely, an unsuccessful tenderer is not a third party to the award proceedings.

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[52] (100/09) [2010] ZAWCHC 25.

[53] See Quinot (2011) *PPLR* 196. Also, *Jicama 17 (Pty) Ltd v West Coast District Municipality* 2006 (1) SA 116 (C); *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008 (4) SA 346 (T); *Syntell (Pty) Ltd v City of Cape Town* [2008] ZAWCHC 120 (13 March 2008); *Loghdey v Advanced Parking Solutions CC* 2009 (5) SA 595 (C).

[54] Paras 33 & 34, fn 23.

[55] 2008 (2) SA 582 (C) para 32.

However, a later decision of the Supreme Court of Appeal in *CC Groenewald v M5 Developments*[56] held that section 62 appeal is available to unsuccessful tenderers. In *CC Groenewald*, it was expressly stated in the award notification that the award was subject to a 21-day appeal period and that a contract would be concluded after that period had lapsed; whereas in *Loghdey*, the award notification did not contain such condition. Notwithstanding, it is submitted that those facts do not constitute viable grounds for distinguishing the two judgments.[57] First, in *Loghdey*, a condition similar to the aforementioned one in *CC Groenewald* was contained in the municipality's Supply Chain Management Policy ("SCMP") and in the conditions of tender.[58] The SCMP and the conditions of tender are deemed incorporated into the award notification and binding on all the parties, as held by the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO of SASSA*.[59] Secondly, in *Loghdey*, the court regarded such condition as merely informative and immaterial in determining whether a right of appeal existed, thus:

> "To attach to such decision (award) a note that it is subject to appeal is not to derogate from its finality."[60]

Thirdly, the decision in *CC Groenewald* did not regard the reference to section 62 appeal in the award notification as what entitled an unsuccessful tenderer to appeal.

Thus, it is opined that exercising a right of internal appeal under section 62 does not depend on whether a reference to it is made in the award notification.[61]

In the recent *DDP Valuers (Pty) Ltd v Madibeng Local Municipality*,[62] the Supreme Court of Appeal regarded, as a matter of course, that a municipality's unsuccessful tenderer is entitled and in fact obligated to exhaust section 62 appeal before resorting to judicial review.[63]

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[56] [2010] ZASCA 47 para 21.

[57] Contra Quinot (2011) *PPLR* 197.

[58] See *Loghdey v City of Cape Town* (100/09) [2010] ZAWCHC 25 paras 16, 18.1 (particularly fn 15), 23, 28, and 32.

[59] 2014 (1) BCLR 1 (CC) paras 38 & 40. See P Volmink "Legal Consequences of Non Compliance with Bid Requirements" (2014) 1 *APPLJ* 41 45.

[60] Paragraph 32. See also paras 29-31. Notwithstanding, it had accepted the distinction made by the court of first instance between *Lodhgey* and *Syntell (Pty) Ltd v City of Cape Town* [2008] ZAWCHC 120 on the issue of making an award subject to appeal period in the award notification.

[61] Supported by Quinot (2011) *PPLR* 197.

[62] [2015] ZASCA 146 paras 23-25. Also in *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality* [2014] ZAECGHC 55; [2014] 3 All SA 560 (ECG) paras 72, 73, 79(3)(2).

[63] Pursuant to PAJA s 7 (2).

It is advised that aggrieved tenderers in a municipality's procurement process should first file section 62 appeal (and probably an interdict application);[64] before proceeding to judicial review, if the appeal is refused or they are unsatisfied with the outcome.

5 3 1 2 2 Municipal SCM Regulations, regulation 49

This provides that a local government's:

> "supply chain management policy … must allow persons aggrieved by decisions or actions taken … in the implementation of its supply chain management system, to lodge within 14 days of the decision or action a written objection or complaint to the municipality or municipal entity against the decision or action"

Although the above vests aggrieved persons with a right to internal review,[65] it does not establish the implementing mechanism. It only directs municipalities and municipal entities to establish such through its SCM policy. The court in *Total Computer Services (Pty) Limited v Municipal Manager Potchefstroom Local Municipality*[66] noted that: "regulation 49 imposes a duty which is directory rather than mandatory and is of limited internal effect". Thus, municipalities' SCM policy is the instrument for giving effect to the Regulations' directive.[67] This is discoverable upon reading together regulations 49 and 50, particularly the clauses stating that the SCM policy must "allow" complaints and "provide for" its resolution.[68]

Where the SCM policy gives effect to regulation 49, suppliers could pursue related complaints.[69] Conversely, where a municipality fails to promulgate the policy, this supplier's review right may remain inchoate.

Another factor that limits suppliers' exercise of this right is regulation 50(7) that provides that:

> "This regulation must not be read as affecting a person's rights to approach a court at any time."

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[64] See 5 3 9 2 1 for rationale.

[65] See Quinot, (2011) PPLR 195-197.

[66] [2007] ZAGPHC 239; 2008 (4) SA 346 (T) para 72.

[67] See *DDP Valuers (Pty) Ltd v Madibeng Local Municipality* [2015] ZASCA 146 16.

[68] In *Olitzki Property Holdings v State Tender Board* [2001] ZASCA 51 paras 17-19, 22- the court held that section 187 of the South African Interim Constitution, which mandated that government procurement shall be regulated by laws providing for a procurement system that meets certain standards, was only a directive to the legislature to make laws with such provisions.

[69] See *Total Computer Services (Pty) Limited v Municipal Manager Potchefstroom Local Municipality* [2007] ZAGPHC 239; 2008 (4) SA 346 (T) paras 71-72.

This means that a bidder need not exhaust this internal remedy before applying for judicial review; notwithstanding PAJA section 7(2)(a),[70] for it gives effect to exhaustion of internal remedies only as provided by the enabling law. A fortiori, the administrative law principle of exhaustion of internal remedies is likewise overridden; for legislation displaces common law.[71]

Also, Systems Act section 62 appeal obviates the usefulness of regulation 49. First, both relate to municipalities' internal remedies. Secondly, regulation 49 remedy is undefined and inferior to that of section 62.[72] Thirdly, being a statute, the application of Systems Act takes precedence over the Regulations.[73] No case decided in terms of regulation 49 was found. However, there are cases of objection brought in terms of some municipalities' SCM policy (made pursuant to regulation 49).[74]

5 3 2 Exempted matters

As noted earlier,[75] essentially no procurement matter is exempted from review in both jurisdictions. Although regulations 21 (Good and Works Regulations) and 22 (Consultancy Regulations) exempt matters such as selection of procurement method from review, that may be regarded as inoperative for various reasons given in 4 3 2 1 2 above, which includes that the Regulations is null and void for its inconsistency with the principal legislation (the PPA). This supports effectiveness of the bidder remedies systems.

However, South African courts[76] have interpreted Systems Act section 62(3) to mean that section 62 appeal *cannot* succeed if it will result in a revocation or variation of a right that has accrued from the appealed decision. This effectively exempts unconditional award or concluded contracts from appeal.[77] Section 62(3) states that:

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[70] See *DDP Valuers (Pty) Ltd v Madibeng Local Municipality* [2015] ZASCA 146 para 20.

[71] See *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14 para 97; also, C Hoexter "Administrative Action in the Courts" (2006) *Acta Juridica* 303 313.

[72] See 5 3 8 2 below.

[73] See Quinot *PPLR* 196.

[74] Examples: *Actaris South Africa (Pty) Ltd v Sol Platjie Municipality* [2008] ZANCHC 6; [2008] 4 All SA 168 para 10; *Total Computer Services (Pty) Limited v Municipal Manager Potchefstroom Local Municipality* [2007] ZAGPHC 239; 2008 (4) SA 346 (T) paras 28, 34 & 71; *Indiza Airport Management (Pty) Ltd v Msunduzi Municipality* [2012] ZAKZPHC 74; [2013] 1 All SA 340 (KZP) paras 4, 7-11.

[75] 2 3 2 3 (ii) and 4 3 2.

[76] See *Loghdey v City of Cape Town* [2010] ZAWCHC 25 para 33; *Loghdey v Advanced Parking Solutions* CC 2009 (5) SA 595 (C); *Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit* 508/2009 (O) [2009] ZAFSHC 21. See also *City of Cape Town v Reader* (719/2007) [2008] ZASCA 130, 2009 (1) SA 555 (SCA) paras 25, 31.

[77] See Quinot, (2011) PPLR 197.

> "The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision."

Notwithstanding that the above judicial interpretation appears settled; there are reasons to reconsider it. First, subsection 3 should not be read in isolation, but in the context of other provisions of section 62.[78] The primary purpose of the section is to provide remedies; which include confirming, varying or revoking the challenged decision (rights would have usually accrued). Thus, the aforementioned interpretation undermines the essence of section 62;[79] which arguably cannot be the intention of the legislature- for the purpose of a law ought to be given effect rather than defeating it.[80] As Blackstone puts it: "One part of the statute must be so construed by another, that the whole may, if possible, stand."[81] Secondly, the interpretation ignores that the word *may*, which was used to qualify the notion of not detracting from an accrued right, should be regarded as connoting a permissive not mandatory requirement.[82] It is significant that while "may" was used in the foregoing, the same subsection used "must", which is indicative of a mandatory requirement,[83] to qualify the consideration of the appeal. Thus, section 62(3) should be interpreted to mean that where a right has accrued from a decision, the appeal authority has discretion to decide whether the decision should be left undisturbed or be reviewed.[84] For example, where a contract is virtually fully executed, the award decision may not be varied or revoked;[85] where it has just been awarded, decision may be reviewable. This accords with what obtains generally in judicial review.

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[78] See *South African Police Service v Police and Prisons Civil Rights Union* [2011] ZACC 21, 2011 (6) SA 1 (CC), 2011 (9) BCLR 992 (CC) para 30; *Botha v Rich N.O* [2014] ZACC 11, 2014 (4) SA 124 (CC) para 35.

[79] This was acknowledged in *Loghdey v City of Cape Town* [2010] ZAWCHC 25 paras 32 & 33. See Quinot, (2011) PPLR 197.

[80] *Ut res magis valeat quam pereat*. See *Rex v Cotterill* (1817) 1 B & Ald 81; *The Beta* (1865) 3 Moo PCC NS 23 25; and FAR Bennion *Bennion on Statute Law* (1990) 117-118.

[81] W Blackstone *Commentaries on the Laws of England* (1765) i 64.

[82] See *Botha v Rich N.O* [2014] ZACC 11, 2014 (4) SA 124 (CC) para 35; *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC). It is however acknowledged that, in appropriate circumstances, courts construe the word "may" as mandatory: see Wade & Forsyth *Administrative Law* 8 ed (2000) 239.

[83] See *Botha v Rich N.O* [2014] ZACC 11, 2014 (4) SA 124 (CC) para 35. See also Y Kim *Statutory Interpretation: General Principles and Recent Trends* a CRS Report for Congress (2008) 9.

[84] The municipalities had been exercising this discretion, as the court in *Loghdey v City of Cape Town* [2010] ZAWCHC 25 para34 acknowledged, but disallowed.

[85] *Chairperson - Standing Tender committee v JFE Sapela Electronics* [2005] 4 ALL SA 487 (SCA) paras 27-29; *Sebeza Kahle Trade v Emalahleni Local Municipal Council* [2003] 2 ALL SA 340 (T) 348.

5 3 3 Cause of action

The focus here is to identify the facts/elements that must be proved by a complainant to be entitled to the remedies under the respective laws.

5 3 3 1 Nigeria

Cause of action for procurement challenge under the PPA is discoverable from section 54(1) that provides that:

> "A bidder may seek administrative review *for any omission or breach by a procuring or disposing entity* under the provisions of this Act, or any regulations or guidelines made under this Act or the provisions of bidding documents."[86]

The only element that a complainant needs to prove to claim internal remedy is that the procuring or disposing entity has caused or allowed an omission or breach, contrary to the provisions of: the PPA, subsidiary legislation made pursuant to the Act, or bidding documents. This is unlike the UNCITRAL Model Law that only mentions the breach of the primary legislation. Nevertheless, it may be argued that the primary legislation incorporates such subsidiary legislation (and the bidding documents), as they are made in terms of the primary legislation. A breach of legislation other than the ones mentioned may not be actionable under this review mechanism. For example, if a procuring entity refuses a bidder access to requested information, contrary to the FOIA,[87] the bidder should rather pursue the remedies provided under that Act instead of those under the PPA.

Unlike the UNCITRAL Model Law and the EU Remedies Directive 2007/66/EC,[88] the PPA does not require complainants to prove that they suffered or may suffer loss or injury because of the alleged breach or omission. Therefore, such breaches are actionable per se. This is similar to what obtains under the GPA's review procedure.[89] The implications of the foregoing are that: (i) the complainant bears a lower burden of proof; (ii) it enhances the right to sue; (iii) it focuses more on enforcing compliance with procurement rules than redressing injury for non-compliance; and (iv) it permits complaints that would have ordinarily been rejected for not disclosing actual or anticipated damage or injury. For example, an unsuccessful

[86] Emphasis added.
[87] The PPA also contains provisions on access to information; but they are not as extensive as those under the FOIA.
[88] Article 64(1), and art 1(3), respectively.
[89] Article XVIII(1).

bidder could secure a review of an award decision where there has been a breach of rules; notwithstanding that the bidder is not eligible to win the award. The PPA's provision on who can seek a review however limits this wide cause of action, as discussed in 5 3 5 below.

5 3 3 2 South Africa

Cause of action for internal review differs slightly in the applicable South African legislation, as seen below.

5 3 3 2 1 Section 62

Under section 62(1), a person whose "rights are affected" by the decision of relevant authorities can appeal against it. Thus, the complainant only needs to prove that his rights are affected by the decision. This is akin to the provision of the UNCITRAL Model Law,[90] requiring that the complainant has suffered or may suffer loss or injury owing to the decision. Unlike under the Nigerian PPA, an appealed decision may not necessarily be in breach of the Systems Act. For example, unsuccessful tenderers are entitled to requested information and reasons for procurement decision;[91] and may appeal under section 62 when such request is refused;[92] notwithstanding that the Act does not provide for such right to information/reason. Also, a demand to tenderers to extend their bid validity period, although not contrary to law, could be appealable under section 62 if tenderers' rights are affected.

5 3 3 2 2 Regulation 49

Here, a complainant only needs to prove that he is *aggrieved* by a decision or action taken in implementing the municipality's SCM system. "Aggrieved" in law refers to "having legal rights that are adversely affected; having been harmed by an infringement of legal rights".[93]

[90] Article 64(1).

[91] Pursuant to PAIA s 11 and PAJA s 5.

[92] Despite PAIA s 74. See *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality* [2008] ZANCHC 73 paras 10 & 25. Also, *Chairperson – Standing Tender Committee v JFE Sapela Electronics* [2005] 4 ALL SA 487 (SCA) para 26; *SMEC South Africa (Pty) Ltd v Mangaung Metro Municipality* [2013] ZAFSHC 106 para 15.

[93] Garner *Dictionary* 77. See *Ex Parte Sidebotham* (1879) 14 Ch D 458 (CA) 465; *Neuhaus v The Master of the High Court* 1932 SWA 30 32; *De Hart NO v Klopper and Botha NNO* 1969(2) SA 91(T); *C P Smaller (Pty) Ltd v The Master* 1977(3) SA 159(T) 163E-164A. *Francis George Hill Family Trust v South African Reserve Bank* (259/90) [1992] ZASCA 50; 1992 (3) SA 91 (AD); [1992] 2 All SA 137 (A). Contra: *Attorney-General of the Gambia v N'jie* (1961) 2 All ER (PC) 510-511C.

This is essentially similar to the cause of action under the UNCITRAL Model Law and section 62 Systems Act.[94]

5 3 4 Who may initiate review proceedings?

The focus here is ascertaining who is entitled or has *locus standi* to apply for the internal remedies under the relevant legislation.[95] The element of an effective bidder remedies system relevant under this subheading is: *bidders have a general right to challenge an act or decision of a procuring entity.*

5 3 4 1 Nigeria

Section 54(1) PPA provides that it is *a bidder* that may seek administrative review. A *bidder* is not defined by the PPA. However, it defines a "contractor and supplier" as:

> "[A]ny *potential party* to a procurement contract with the procuring entity and includes any corporation, partnership, individual, sole proprietor, joint stock company, joint venture or any other legal entity through which business is conducted".[96]

This is similar to article 2 (t) of the UNCITRAL Model Law:

> "Supplier or contractor" means, according to the context, any potential party or any party to the procurement proceedings with the procuring entity"

However, the context in which "bidder" is used in the PPA indicates that it means a contractor or supplier *that actually submitted a bid*.[97] Thus, it may be argued that only those that submitted bids are entitled to remedies under the PPA. This limits the ostensible wide cause of action for review application under the PPA.

However, a supplier or contractor who had a potential interest to bid but was excluded, owing for example to wrongful use of restrictive procurement method, may argue that it could apply for review. First, since the PPA does not exempt choice of procurement methods from review, it is arguable that the legislative intention is for contractors excluded by a wrongful use

[94] Contra Quinot *PPLR* 196.
[95] See ch 2, 2 3 2 3 (iii).
[96] Section 60 (emphasis added).
[97] See for example PPA s 16, particularly subss 6-8, & 24.

of procurement method to challenge it. Secondly, no decided authority has established that only *bidders* are entitled to review.

5 3 4 2 South Africa

Right of internal review under the applicable South African legislation is wider than what obtains under the Nigerian PPA.

Under section 62(1) of Systems Act, right to "appeal" is vested on a "person whose rights are affected by a decision taken" by a municipality's delegated authority.[98] A "person" is wider than "supplier/contractor" or "bidder/tenderer".[99] The appellant need not be an unsuccessful or potential bidder; provided he establishes that his rights are affected.[100] Thus, a resident whose rights are affected by a municipality's procurement decision is arguably entitled to appeal; however, South African courts have held to the contrary.[101]

Right of review under regulation 49 is for "persons aggrieved by decisions or actions taken"; which is equivalent to that under section 62(1) Systems Act. However, regulations 49 review is strictly procurement related; thus section 62 appeal is wider in scope.[102]

5 3 5 The forum

The composition and nature of the body or the person authorised within or by the procuring entity to entertain reviews are examined here.

5 3 5 1 Nigeria

The internal review authority is the accounting officer of the procuring entity. An accounting officer is the person charged with the line supervision of the conduct of all procurement processes of the entity; in ministries, it is the Permanent Secretaries, and in extra-ministerial departments and corporations, it is the Director-Generals or officers of co-ordinate responsibility.[103] The accounting officer is also the chairman of the entity's procurement

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[98] See *Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit* [2009] ZAFSHC 21.
[99] See Garner *Dictionary* 1257 "person".
[100] Note limitations discussed in 5 3 1 2 1above.
[101] See *Loghdey v City of Cape Town* (100/09) [2010] ZAWCHC 25. *Reader v Ikin* 2008 (2) SA 582 (C) at para 32; *City of Cape Town v Reader* [2008] ZASCA 130; 2009 (1) SA 555 (SCA); which was cited with approval in *Camps Bay Ratepayers and Residents Association v Harrison* (CCT 18/10) [2010] ZACC 19, 2011 (2) BCLR 121 (CC), 2011 (4) SA 42 (CC). See also Quinot *PPLR* 196-197.
[102] See Quinot *PPLR* 196.
[103] PPA ss 20(1) & 60; 16(21) & (22).

planning committee, and its tender board, which is an approving/awarding authority for contracts within certain thresholds.[104]

As the accounting officer is clearly a judge in his own case, he may be biased.[105] However, the maxim *nemo judex in causa sua* (no one should be a judge in his own cause), may not invalidate this mechanism. First, the mechanism is essentially an opportunity for the procuring entity to reconsider and possibly correct its decision. Secondly, the Nigerian Constitution[106] allows such administrative review, provided: (1) it permits the person whose rights and obligations may be affected to make representations before the authority gives its decision, and (2) the decision of the authority is not final.[107]

5 3 5 2 South Africa

5 3 5 2 1 Section 62

Section 62 appeal is entertained by various review forums within the municipality, depending on the officer/office that made the challenged decision.[108]

When the appeal is against a decision taken by:

(a) a staff member other than the municipal manager- the municipal manager is the appeal authority;

(b) the municipal manager- the executive committee or executive mayor is the appeal authority, or, if the municipality does not have an executive committee or executive mayor, the municipal council is the appeal authority;

(c) a political structure or political office bearer, or a councillor-

(i) the municipal council is the appeal authority where the council comprises less than 15 councillors; or

(ii) a committee of councillors who were not involved in the decision and appointed by the municipal council for this purpose is the appeal authority where the council comprises more than14 Councillors."

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[104] PPA ss 17, 21(2); FGN circular SGF/OP/I/S.3/VIII/57 of 11-3-2009 4.

[105] On the general problem of lack of independence and impartiality of procuring entity's internal review see: Zhang (2009) *PPLR* 211; Gordon (2006) *PPLR* 433; A Reich *International Public Procurement Law: The Evolution of International Regime on Public Purchasing* (1999) 226.

[106] Section 36(2).

[107] See 5 3 8 1 and 5 3 9 below.

[108] See Systems Act s 62(4).

Section 62 appeal may not apply against a decision of a municipal council. First, section 62 does not establish an appeal authority for decisions of municipal councils. Secondly, the decisions of municipal councils are generally not subject to section 62 appeal; considering that: (1) it is only decisions taken in terms of a delegated or sub-delegated power or duty that are subject to the appeal; (2) a municipal council does not exercise delegated or sub-delegated power, as it is the delegating/ultimate authority for the municipality.[109] Besides, a municipal council cannot delegate its own procurement role;[110] which is to enter into the related service delivery agreement,[111] after procurement procedure and award has been completed by the relevant delegated authorities.[112]

Although the appeal authorities above are structured hierarchically, a higher appeal authority cannot review the appeal decision of a lower one.[113] The structure of the forums engenders independence and less likelihood of bias, than what obtains under the Nigerian system. First, each appeal authority under section 62 is higher in authority than the offices/officers subject to its jurisdiction. Secondly, the forums are not composed of the offices/officers that took the challenged decision.

5 3 5 2 2 Municipal SCM Regulations

According to regulation 50 (1), an independent and impartial person not directly involved in the municipality's or municipal entity's SCM processes, appointed by the municipality's accounting officer, shall be the review authority. Essentially, the person must not be a staff of the municipality or municipality entity. The arrangement in *Sgananda Consulting (Pty) Ltd v Mnambithi FET College*,[114] where the procuring entity appointed a retired judge as the review authority is arguably envisaged.

As argued above,[115] regulation 50(1) did not establish the forum; it only directs that a municipality or municipal entity's SCM policy shall establish it.

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[109] Systems Act 59(1).
[110] Systems Act s 59(1)(a).
[111] In terms of section 76(b).
[112] Such as a municipal manager, a tender evaluation committee and tender adjudication committee (both committees' decisions are subject to the municipal manager's appeal authority). See *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008 (4) SA 346 (T) paras 9-10; and *CC Groenewald v M5 Developments* [2010] ZASCA 47 paras 7-10.
[113] See facts of *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008 (4) SA 346 (T); and *CC Groenewald v M5 Developments* [2010] ZASCA 47.
[114] [2014] ZAKZPHC 28 para 3 (J). Note however that the case did not involve the Municipal SCM Regulations.
[115] 5 3 1 2 2.

5 3 6 Lodging complaints and the timeframe

The issues examined here are: timeframe for applying for review, implications of applying out of time, and whether extension of time is permitted.

5 3 6 1 Nigeria

A complainant-bidder must apply for review within fifteen working days from the date he first became aware of the circumstances giving rise to the complaint or should have become aware of the circumstances, whichever is earlier.[116] Thus, time begins to run from the earliest date the complainant-bidder had any actual, constructive, implied or imputed notice of the breach.[117] For instance, unsuccessful bidders are expected to access the record of the procurement proceeding shortly after the notice of award, to possibly identify any breach and seek a review within time.[118] Failure to do this does not keep time from running; this ensures vigilance and expeditiousness amongst bidders. The UNCITRAL Model Law enshrines constructive notice of breach, as it does not refer to bidders' awareness of breach, rather it stipulates periods for submitting a challenge application.[119]

There is no provision for extension of this timeframe. Therefore, an accounting officer may reject a complaint filed out of time, for non-compliance with a condition precedent.[120] Complaints rejected on that ground shall not be entertained by the external review forum (BPP); as the PPA stipulates that the internal review shall be *exhausted* before external review.[121] If the BPP entertains it, the procuring entity or the successful bidder can object.[122] It would be presumed that complaints are filed within time;[123] thus, the review authority or a successful bidder is responsible for objecting to a complaint filed out of time. However, where a complaint is submitted first (erroneously) to the BPP, it usually transfers it to the accounting

[116] PPA s 54(1)(a).
[117] On definition of the various forms of notice, see Garner *Dictionary* 1164; *Animashaun v Olojo* (1990) 10 SCNJ 43, (1990) 6 NWLR (Pt.154) 111.
[118] See PPA s 38(2)(b) on access to procurement records.
[119] Article 66(2).
[120] See *Oshevire v British Caledonian Airways Ltd* (1990) 7 NWLR (Pt 163) 507; *Fayemi v Local Government Service Commission, Oyo State* [2005] 6 NWLR (PT. 921).
[121] Section 54(2), (2)(c) and (3).
[122] PPA s 54(7).
[123] Evidence Act 2011 s 168(1).

officer.[124] The practice is defensible, and it may be deemed that the internal review time, if still available, stopped running when the BPP received the complaint.[125]

5 3 6 2 South Africa

Under section 62 of Systems Act, the affected person is required to lodge an appeal within 21 days of the *notification* of the decision being challenged.[126] Time begins to run when the person had actual notice of the decision. However, such notification may reach the affected person in any manner and from whomever, not necessarily from the delegated authority.[127] Written notice is not required; and notification need not be accompanied with reason for decision for time to run.[128] These do not violate the right to fair administrative action under the Constitution[129] and PAJA.[130] However, where an aggrieved person requests reason for decision before deadline for filing appeal, time may be deemed to stop running until the reason is furnished.[131]

No authority may extend the time when it lapses.[132] Thus, an appeal lodged out of time is void, entitling a successful bidder to raise objection and the municipality to reject the appeal.

Section 62 is similar to Nigeria's PPA on the subject-matter under consideration; except that the scope of notice required for review application time to start running is wider in the former.

Under Regulation 49, the aggrieved person shall lodge the complaint within fourteen days following the defective decision or action.[133] This timeframe is more definite than those considered above, since it does not depend on the notice or awareness of the decision or action

[124] From author's observation in the course of involvement in related procurement challenge cases.
[125] Accords with Nigeria's judicial and civil service practice; see for example Federal High Court Act Cap F12 LFN 2004 s 22; FOIA s 5.
[126] Systems Act s 62(1).
[127] *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality* [2014] ZAECGHC 55, [2014] 3 All SA 560 paras 40-43. Notice obtained from the municipality's website suffices.
[128] *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality* [2014] ZAECGHC 55, [2014] 3 All SA 560 para 40.
[129] Section 33(2).
[130] Section 5(1).
[131] *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality* [2014] ZAECGHC 55, [2014] 3 All SA 560 para 45; *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality* [2008] ZANCHC 73 para 25; *Chairperson – Standing Tender Committee v JFE Sapela Electronics* [2005] 4 ALL SA 487 (SCA) para 26.
[132] *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality* [2014] ZAECGHC 55, [2014] 3 All SA 560 para 73.
[133] Municipal SCM Regulations reg 49.

to start running- this is akin to article 66(2) of UNCITRAL Model Law. This necessitates extra vigilance by suppliers, as certain decisions or actions of a municipality may not be communicated or accessible until this time lapses. Moreover, the time is shorter than that provided by the Systems Act. However, section 62 timeframe will prevail over that of regulation 49, as the latter is a subsidiary legislation.[134] Nonetheless, the High Court had interpreted the fourteen days as only a prescriptive minimum period; thus, an SCM policy can validly prescribe a longer period.[135] A complaint pursuant to regulation 49 filed outside the time prescribed by the regulation or a municipality's SCM policy may be void; although it could still be entertained as a section 62 appeal, if time for that has not also elapsed.[136]

Generally, not providing persons entitled an opportunity to submit review application within the stipulated time constitutes invalidity (Nigeria) or procedural unfairness (South Africa), liable to judicial review.[137]

5 3 7 The proceedings

Examined here are: suppliers' access to procurement records for purpose of procurement review, the procedures and timeframes for completion of review.

5 3 7 1 Nigeria

(a) Access to information

Bidders' right of review or response thereto is enhanced by their right of access to comprehensive records of the procurement proceeding, within seven days after effectively applying for them.[138] This time limit may only be extended for another seven days where the application entails gathering a large number of records or where consultation is required to grant access, which may not reasonably be completed within the original time limit.[139] The time limit is relatively prompt.[140] Access to information is enhanced by provisions that judicial

[134] See also Quinot (2011) *PPLR* 197.
[135] *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008 (4) SA 346 (T) para 71.
[136] See *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008 (4) SA 346 (T) paras 68 & 71.
[137] See *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008 (4) SA 346 (T) para 74.
[138] PPA, s 38(2) & (3) and FOIA s 4(a).
[139] FOIA s 6.
[140] The global average is fifteen working days: Open Society Institute *Transparency & Silence: A Survey of Access to Information Laws and Practices in Fourteen Countries* (2006) 176, available at

review against denial of access shall be determined summarily and that wrongful denial constitutes an offence.[141] The foregoing corresponds with the element of effectiveness relating to *prompt access to related procurement records*.

(b) Review procedure

A complaint must be in writing and submitted to the relevant accounting officer.[142] The accounting officer, in private, considers the complaint with the facts or records available to him. He may not invite representation from the other bidders; as the PPA does not require that. However, where the review decision may affect the civil rights and obligations of any bidder, representation from the bidder(s) should be invited.[143] By practice, representations are by written submissions, not oral hearing. The accounting officer may delegate some aspects of the review responsibility to an officer within the entity, to enable him meet review deadline. However, he will still in any circumstance be responsible for issuing the review decision, in writing.[144]

(c) Review timeframe

The accounting officer has fifteen working days following receipt of a complaint to make his decision.[145] This corresponds with the element of effectiveness requiring that a review forum shall have the ability to proceed swiftly within a reasonably short period of time.

5 3 7 2 South Africa

5 3 7 2 1 Section 62 appeal

(a) Access to information

The Systems Act grants bidders equal and simultaneous access to information relevant to the bidding process.[146] In addition, an information requester is entitled to access to records of a public body within 30 days after submitting request, pursuant to PAIA, sections 11, 18 and

<https://www.opensocietyfoundations.org/publications/transparency-and-silence-survey-access-information-laws-and-practices-14-countries> (accessed 21-10-2017).

[141] FOIA ss 7(5), 21. See JM Ackermann & IE Sandoval-Ballesteros 'The Global Explosion of Freedom of Information Laws' (2006) 58 *Administrative Law Review* 85 118.

[142] PPA s 54(2).

[143] See the Constitution s 36(2); also 5 3 5 1above.

[144] PPA ss 54(2)(b), 16(21) & (22). See also 5 3 8 1below.

[145] PPA s 54(2)(b).

[146] Section 83(1)(b).

25.[147] This response time could be extended by another 30 days.[148] If access is denied, a requester may within 60 days appeal internally to a relevant authority.[149] The authority has 30 days following receipt of the appeal to give decision.[150] The requester, if aggrieved, may within 30 days apply for judicial review, which has no definite conclusion time.[151] Furthermore, tenderers can request written reasons for procurement decision, within 90 days of becoming aware of the decision; and the entity shall respond within 90 days.[152] The cumulative time for accessing requested information or reason for administrative decision in South Africa is quite long compared to the global average.[153] It does not align with the element of effectiveness requiring prompt access to related procurement records. Actually, the 21 days allowed for lodging appeal may elapse before required information/records are accessed.

However, access to information should be granted to tenderers earlier than PAIA's maximum allowable time as a matter of right, according to the court in *Actaris South Africa (Pty) Ltd v Sol Platjie Municipality*.[154] Also, if a tenderer applies for reasons for procurement decision, the time for lodging section 62 appeal will begin to run from the date the reasons were received.[155] Besides, a tenderer may lodge an appeal based on information from a third party;[156] this however is speculative and not generally advisable.

(b) Review procedure

Section 62 appeal is initiated by the affected tenderer giving written notice of appeal with reasons/grounds to the Municipal Manager.[157] A tenderer's letter requesting information on the tender process, which discloses an intention to lodge an appeal, does not serve as a notice of appeal.[158] The municipal manager must promptly submit the appeal to the appropriate appeal

[147] Also, SA Constitution s 32.
[148] PAIA s 26.
[149] PAIA s 74, 75(1)(a). See s 1 for definition of "relevant authority".
[150] PAIA s 77(3).
[151] PAIA ss 78 & 79.
[152] PAJA s 5(1) & (2). See South African Constitution s 33; *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality* [2014] ZAECGHC 55, [2014] 3 All SA 560 para 41.
[153] See fn 134. Roling *Transparency & Access to Information* 49.
[154] [2008] ZANCHC 6; [2008] 4 All SA 168 para 25. See also Roling *Transparency & Access to Informaion* 50, Open Society Institute *Transparency & Silence* 183 & 185.
[155] See 5 3 7 2 1.
[156] See *Actaris South Africa (Pty) Ltd v Sol Platjie Municipality* [2008] ZANCHC 6; [2008] 4 All SA 168 para 10; where appeal was based on rumour.
[157] Subsection (1).
[158] *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality* [2014] ZAECGHC 55, [2014] 3 All SA 560 para 14 & 50.

authority identified in 5 3 5 2 1 above.[159] An appeal authority must commence consideration of the appeal within six weeks of receiving it.[160] The consideration involves examining the objections raised; reviewing the tender process and documentation; obtaining opinions of officials that conducted the tender process; where necessary, seeking legal advice; and requesting written representations from the affected tenderer(s).[161] *CC Groenewald v M5 Developments*[162] indicates that only tenderers who appealed shall be heard (against the municipal authority and the successful tenderer). Thus, the appeal authority shall not reconsider all the tenders or hear all the tenderers.[163]

(c) Review timeframe

The appeal authority is required to give a decision *within a reasonable period*.[164] Thus, there is no definite timeframe for completion of the appeal. In this circumstance, the appeal authority may not act with a sense of urgency towards determining the appeal within days or a few weeks. For example, the appeal in *CC Groenewald v M5 Developments*[165] took nine months to be finalised. This timeframe does not correspond with the element of effectiveness requiring the ability to proceed swiftly within a reasonably short period of time, in terms of days and weeks. The element entails providing definite timeframe (specified days or weeks) for review. Section 62(5) did not stipulate a definite timeframe; thus, it permits the lengthening of proceeding, as in *CC Groenewald v M5 Developments* above.

5 3 7 2 2 Regulation 49

(a) Access to information

The Municipal SCM Regulation does not provide for access to procurement information; however, PAIA could be relied upon as obtained under the Systems Act.

(b) Review procedure

Regulation 49 review is commenced by a written objection or complaint to the municipality or municipal entity against the procurement decision or action concerned. Following this, the municipality's accounting officer submits the complaint to the adjudicator described in 5 3 5 2

[159] Systems Act s 62(2).
[160] Systems Act s 62(5).
[161] See *CC Groenewald v M5 Developments* [2010] ZASCA 47 paras 13-17.
[162] [2010] ZASCA 47 paras 24-25.
[163] This, according to *CC Groenewald v M5 Developments* [2010] ZASCA 47 paras 24-25, is to save time.
[164] Section 62(5).
[165] [2010] ZASCA 47 para 11.

2 above. The review procedure will most likely be similar to that of the Systems Act appeal; although the adjudicator is at liberty to adopt any procedure that he deems fit.[166] The accounting officer or any official he designates assists the adjudicator in performing its functions; which could include providing required facilities and relevant records.[167]

(c) Review timeframe

According to regulation 50(4), the adjudicator shall strive to *promptly resolve* the complaint, and submit related report to the accounting officer. Thus, no definite timeframe is provided within which to complete the review. This is similar to what obtains under the Systems Act appeal discussed above- the views expressed there also apply here. However, an aggrieved bidder may refer the complaint to the provincial treasury if the complaint is not resolved after 60 days.[168]

5 3 8 Available remedies and enforcement

The extent to which the various internal review forums may intervene in procurement proceedings and redress breaches, and whether these correspond with the elements of effectiveness that relate to remedies are considered here. These elements include: (a) decisions of review forum are binding; (b) the possibility of intervention without delay by the forum; (c) the forum has power to suspend or cancel the procurement proceedings and to prevent the entry into force of a procurement contract while the dispute remains outstanding; (d) available remedies meet the system's needs; and (e) decisions/remedies given can be easily enforced by a fast and simple mechanism.

5 3 8 1 Nigeria

The accounting officer decides the *corrective measures* to be taken if any, including the suspension of the procurement proceedings where he deems necessary.[169] Making suspension discretionary is defensible, since the execution of contract does not foreclose a review. Besides, the review timeframe is quite short; thus, the accounting officer can intervene without delay in the procurement proceedings. *Corrective measures* generally involve making right what is wrong in the challenged procurement;[170] and may specifically include: stopping, varying or

[166] Deducible from Municipal SCM Regulations reg 50(1) (b) & (4).
[167] Municipal SCM Regulations reg (3)(c).
[168] Regulation 50(5).
[169] PPA s 54(2)(b).
[170] See Garner *Dictionary* 396 "corrective".

overturning the challenged procurement decision or action. Monetary compensation is not a remedy under the PPA. Although, "corrective measures" may be interpreted to include the power to award compensation;[171] the interpretation does not align with the general tenor of remedies provided under the PPA.[172] Besides, it is most unlikely that awarding compensation would be an option for the accounting officer, considering regulatory and budgetary controls to expenditure.[173]

The accounting officer's decision is authoritative,[174] being the highest procurement decision-maker and highest office holder within the procuring entity (except for ministries, where the ministers are the highest political office holders and the accounting officers are the highest ranking civil servants).[175] The review decision will be easy to implement, since it is a reconsideration of the procurement decision/action taken or supervised by the accounting officer himself; and the implementation is undertaken internally. The available remedies and the enforcement correspond with all the related elements of effectiveness identified above.

5 3 8 2 South Africa

5 3 8 2 1 Section 62 appeal

The appeal authority can "confirm, vary or revoke" the challenged procurement decision.[176] It cannot refer the decision back to the decision-maker for reconsideration;[177] and does not have power to suspend the procurement proceeding. However, filing an appeal automatically suspends the proceeding, to prevent the entry into force of a contract.[178] This suspension is critical considering that concluded contracts may not be appealable under section 62.[179]

Notwithstanding, it is advisable for the aggrieved bidder to apply for interdict to prevent execution of the contract while the appeal is pending; as the procuring entity may ignore the

[171] Quinot "Supplier Remedies" in *Public Procurement Regulation* 329.
[172] See PPA s 54(4)(b).
[173] See for example CFRN 1999 s 80.
[174] PPA ss 16(22).54(2)(b).
[175] See PPA s 20.
[176] Section 62(3).
[177] *CC Groenewald v M5 Developments* [2010] ZASCA 47 para 27.
[178] *Actaris South Africa (Pty) Ltd v Sol Platjie Municipality* [2008] ZANCHC 6; [2008] 4 All SA 168 (NC) para 27; *Loghdey v City of Cape Town* [2010] ZAWCHC 25 para 1; *Chairperson - Standing Tender committee v JFE Sapela Electronics* [2005] 4 ALL SA 487 (SCA) paras 25 and 26. See also SCM Policy (City of Cape Town) clause 245.
[179] Systems Act s 62(3). See 5 3 2 above and authorities cited there.

suspending effect of the appeal. It may be impractical to overturn a completed or nearly-completed contract even if the award was invalid.[180]

Decisions of the appeal authority are binding. However, its intervention is not expeditious as seen in 5 3 7 2 1(c) above. The appeal authority is a higher authority within the procuring entity than the procurement decision-maker; thus, its decisions will be readily followed. Also, being an internal mechanism, implementing review decision will be fast and simple. The remedies under section 62 appeal align with the related elements of effectiveness; but are undermined by exemption of unconditional award and concluded contracts from appeal, and the uncertainty about the applicability of the appeal to unsuccessful tenderers.[181]

5 3 8 2 2 Regulation 49

No definite remedies are provided for regulations 49 review; the review authority is only enjoined to "strive to resolve" the objections and complaints.[182] It may be argued that the review authority under regulation 49 may exercise the powers available under section 62 of Systems Act, being a statute applicable to municipalities.[183] However, according to *DDP Valuers (Pty) Ltd v Madibeng Local Municipality*,[184] its powers do not include correcting or setting aside the Municipality's decision.

Similar to section 62 appeal the review authority's decisions are binding- it *resolves* the complaints.[185] However, its intervention is not expeditious,[186] and suspension of procurement proceeding is outside its remit. Implementing the review decisions may not be as easy as obtains under the System Act, as the review authority does not implement its decision; rather it refers it to the accounting officer for implementation. The review authority's appointment may be terminated on completion of review and he will be unable to follow up his decision to ensure implementation. Besides, he does not have any form of coercive powers. Enforcement of review decision thus depends on the goodwill of the accounting officer. Effectiveness of the remedy under this mechanism is weakened by its indefiniteness, its dependent enforcement

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[180] *Chairperson - Standing Tender committee v JFE Sapela Electronics* [2005] 4 ALL SA 487 (SCA) paras 26-29; *Sebeza Kahle Trade v Emalahleni Local Municipal Council* [2003] 2 ALL SA 340 (T) 348. See also *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) para 1265F-H. See Quinot *PPLR* (2011) 198.

[181] See 5 3 1 2 1 and 5 3 2 above.

[182] Regulation 50 (4).

[183] See Quinot *PPLR* (2011) 196. Contrast: P Bolton "Municipal Tender Awards and Internal Appeals by Unsuccessful Bidders" (2010) 13 (3) *PELJ* 56 73.

[184] [2015] ZASCA 146 18.

[185] Regulation 50(4).

[186] Regulation 50(4).

mechanism and other factors identified in 5 3 1 2 2 above. Moreover, in *DDP Valuers (Pty) Ltd v Madibeng Local Municipality*,[187] it was held that Regulation 49's review falls short of an internal remedy (to be exhausted) under section 7(2) of PAJA.

5 3 9 Right of appeal/further review

The multilevel remedies systems of Nigeria and South Africa are enabled by law entitling bidders to appeal review decisions, as presented below.

5 3 9 1 Nigeria

An aggrieved bidder can appeal to the BPP where:[188]

(a) the accounting officer does not make a decision within the prescribed review period;

(b) the bidder is not satisfied with the decision of the accounting officer.

5 3 9 2 South Africa

Under Systems Act section 62, no right to appeal the review decision is provided. However, it is an inherent administrative law right to apply for judicial review of the appeal decision,[189] having exhausted the internal remedies.[190]

An affected bidder who has applied for review under regulation 49 has right to appeal to the provincial treasury, if:

(a) the complaint is not resolved within 60 days of filing; or

(b) no response is received from the municipality or municipal entity within the 60 days.[191]

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[187] [2015] ZASCA 146 18 & 20.

[188] See PPA s 54(2)(c) and (3); and ch 6.

[189] See ch 7; *CC Groenewald v M5 Developments* [2010] ZASCA 47 paras 2, 17, 27.

[190] See Quinot *PPLR* (2011) 200, 202; Quinot *State Commercial Activity* 162-163; Bolton *Government Procurement* 18-19 (and the authorities cited there); *Eskom Holdings v The New Reclamation Group* 2009 (4) SA 628 (SCA) para 11. See also PAJA s 7(2)(b); *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality* [2014] ZAECGHC 55, [2014] 3 All SA 560.

[191] Municipal SCM Regulation reg 49(5)(a) & (b). See ch 6.

5 4 Summary of basic features of the internal administrative review regimes

A summary of the basic features of the internal review mechanisms in both systems are set out in the table below.

Features	**Nigeria**	**South Africa**
Enabling legislation	PPA, section 54(2)	1. Section 62 of Systems Act. 2. Regulation 49 of the Municipal SCM Regulations: given effect through municipals' SCM policy.
Exempted matter	None	Unconditional award or concluded contracts (section 62)
Cause of action	An omission or breach, contrary to the provisions of: the PPA, subsidiary legislation made pursuant to the Act, or bidding documents.	Rights adversely affected by procurement decision.
Right to institute review	Actual and potential bidders in the challenged procurement.	Any person whose rights are affected by the municipal's procurement decision.
Forum	Accounting officer (AO) of the procuring entity.	1. Municipal Manger, Executive Committee/ Executive Mayor, Municipal Council, or Committee of Councillors (section 62). 2. An independent and impartial person appointed by the municipality's accounting officer. (regulation 49).
Commencement timeframe	Within fifteen working days from the date the complainant	1. Within 21 days of the notification of the decision being challenged (section 62).

	had actual or implied notice of the breach.	2. Within fourteen days following the challenged decision or action (regulation 49).
Access to information/record	Within seven days after effectively applying for the information. May be extended for another seven days (FOIA)	Within 30 days after effectively applying for the information. May be extended for another 30 days (PAIA).
The proceedings and timeline	Written complaint or representation submitted to the AO, for consideration and decision within fifteen working days following receipt of complaint.	1. Written notice of appeal with reasons/grounds to the Municipal Manager, who promptly submits to the appropriate reviewer that must commence the review within six weeks of receiving it and give decision within a reasonable period (section 62). 2. Written objection or complaint submitted to the municipality or municipal entity, to present to the adjudicator for consideration and *prompt* resolution (regulation 49).
Available remedies and enforcement	*Corrective measures*, which may include: suspending, stopping, varying or overturning the challenged procurement decision/action. Decision implemented by the entity.	1. Confirm, vary or revoke the procurement decision (section 62). Decision implemented by the entity. 2. Resolution of the complaints (may not include correcting or setting aside the Municipality's decision). AO may implement decision (regulation 49).

Right of further review/appeal	Right of appeal to the BPP, if decision is not given within deadline or is unsatisfactory.	1. right to judicial review (section 62 and regulation 49). 2. Appeal to provincial treasury if no decision is given within 60 days after complaint (regulation 49)

5 5 Conclusion and Analysis

As seen above, the internal review mechanisms of Nigeria and South Africa are similar in a few respects; such as: their jurisdiction is limited to procurements of a particular tier of government;[192] they are compulsory first forum; review is by considering written submission of parties; review decisions are binding and appealable. Dissimilarities exist in most other aspects. The mechanisms in their own way largely meet the relevant elements of an effective remedies system. However, prompt access to procurement information and ability of review forum to proceed swiftly and intervene expeditiously in procurement proceedings are lacking in the South African mechanisms. Besides, the uncertainty about the right of unsuccessful tenderers to section 62 appeal; the practical exemption of unconditional award and concluded contracts from section 62 appeal; and the unviability of regulation 49 mechanism are also set-backs to the effectiveness of South Africa's internal review mechanisms. This buttresses that the design of the remedies mechanisms affects their effectiveness, in this case adversely. Although, Nigeria's mechanism scores more on elements of effectiveness, it is less independent and impartialitial owing to the constitution of the forum.

South Africa may consider adopting the short response time to information-request provided under the Nigerian FOIA,[193] which is 7 days, extendable by another 7 days. To do this, South Africa will amend the PAIA to abridge its response time, which is currently 30 days, extendable by another 30 days.[194] This is in view of the importance of access to records in exercising review right. Also, the effective exemption of unconditional awards or concluded contracts from the appeal under the Systems Act,[195] justifies such abridgement of time, so bidders could prmptly obtain records to commence the appeal before an award or contract.

The external administrative review mechanisms are considered in the next chapter.

[192] Nigeria: federal government; South Africa: municipalities.
[193] Section 4(a) & 6. See 5 3 7 1(a) above.
[194] Sections 11, 18, 25 & 26. See 5 3 7 2(a) above.
[195] As seen in 5 3 2 above.

Chapter 6

External Administrative Review

6 1 Introduction

External administrative review is a procurement challenge, or an appeal against an internal review, before an administrative authority that is external to and independent of the procuring entity whose procurement decision is being challenged. External review could be a first instance review or a follow-up to an internal review.

The components of external review in Nigeria and South Africa, such as the applicable laws, the forum, available remedies, among others, are examined below. Some of these components are compared with related elements of effective remedies systems and relevant international legislation.[1]

6 2 Enabling laws

6 2 1 Nigeria

Section 54(3) of the PPA establishes external review right, by providing that if:

> "The bidder is not satisfied with the decision of the accounting officer, the bidder may make a complaint to the Bureau…"[2]

This external review is thus in the form of a second stage administrative review of the challenged procurement decision; or an appeal against a procuring entity's internal review decision. As seen earlier,[3] it is not permissible to pursue this external review without first exhausting the internal review.[4] Conversely, the UNCITRAL Model Law,[5] on which the Nigerian PPA is based, permits external review as a first-instance challenge; apart from being pursuable as an appeal against an internal review decision or indecision. This is possible

[1] The UNCITRAL Model Law art 67; GPA XXVIII (3) provide for external administrative review. see also EU Remedies Directive art 2(9).
[2] "Bureau" refers to the Bureau of Public Procurement (BPP); see 3 3 1 above.
[3] 5 3 1 1 above.
[4] PPA s54(2); *Ofscon Nig Ltd v Min of Niger Delta* Affairs FHC 21-03-2012 suit no FHC/Abj/CS/315/2011; *Integrated Remediations Limited v Federal Ministry of Environment* FHC 14-11-2012 suit no FHC/Abj/CS/841/2010; *A.C Egbe Nig Limited v DG BPP* FHC 21-07-2010 suit no FHC/B/CS/116/2010.
[5] Articles 66(4) & (7) & 67(1). See also GPA art XVIII (2) & (5).

because internal review is optional under the international legislative framework;[6] unlike the PPA.[7]

Making internal review a mandatory first recourse, as obtained in Nigeria, aligns with the principle of exhaustion of internal remedies.[8] Also, bypassing internal review may unnecessarily burden the external administrative or judicial review forum with cases that would have been satisfactorily resolved by the procuring entity, at an earlier and less disruptive stage and with lower costs.[9] On the other hand, making internal review optional allows a supplier that is sceptical about getting remedy from the procuring entity, probably owing to likelihood of bias, to straightaway seek redress before an independent administrative or judicial review body.[10]

6 2 2 South Africa

The Municipal SCM Regulations 50(5) and (6), and the Treasury Regulations 16A9.3, provide for external administrative review of procurement decisions of municipalities, and of provincial and national governments, respectively. These are considered below.

6 2 2 1 Municipal SCM Regulations

Regulation 50(5) provides that a procurement challenge against a municipality may be referred to the relevant provincial treasury if:

> (a) an internal review under regulation 50(1) and (4) is not resolved within 60 days; or
> (b) no response on the internal review is received from the municipality or municipal entity within 60 days.

Furthermore, regulation 50(6) provides that:

> "If the provincial treasury does not or cannot resolve the matter … [it] may be referred to the National Treasury for resolution."

The above constitutes a two-stage external review. The complaint to the provincial treasury is not an appeal against the internal review decision; and a complaint to the National

[6] UNCITRAL Model Law art 66(1) and Guide to Enactment commentary 11 to ch VIII of Model Law 230; GPA XVIII (2). Conversely, the EU Remedies Directive art 1(5) permits member states to require the person concerned to *first* seek review with the contracting authority. In this case, external review or judicial review may only be pursued as a 2nd stage review.

[7] Section 54(2). See 5 3 1 1 above.

[8] See 5 2 3 above.

[9] See Guide to Enactment commentary 11 to ch VIII of Model Law 230.

[10] See Udeh (2013) *PPLR* 187-188 for further support for bypassing internal review.

Treasury is not an appeal against the review decision of the provincial treasury. Rather, in both cases, it is a complaint against the municipality's original procurement decision, owing to the failure of the initial review forum to resolve the complaint. The internal review under regulation 50(1) and (4) is a precursor to the external review; and, the weaknesses of the internal review mechanism, seen earlier,[11] militate against these external review options.

6 2 2 2 Treasury Regulations

Regulation 16A9.3 (a) provides that the National Treasury and each provincial treasury must establish a mechanism to receive and consider complaints regarding alleged non-compliance with the prescribed minimum norms and standards on supply chain management ("SCM").[12] This mechanism is intended to resolve complaints against procurement decisions of departments, constitutional institutions and public agencies of provincial and national governments only, as prescribed by regulation 16A2.1. Considering the context of regulation16A9.3 (a) and (b), which refers to "consider complaints"[13] and "remedial measures", the regulation generally envisages an external review, not a mere administrative investigation.[14] Since the National Treasury is a procuring entity under a transversal term contract,[15] this mechanism may constitute an internal review for the Treasury's procurement. In this latter case, the Treasury will not be deemed as independent.

Similar to the internal review provision of the Municipal SCM Regulations,[16] regulation 16A9.3 (a) only directs that a mechanism for procurement review be established. It does not provide guidance on how the mechanism would operate.[17] Thus, until the mechanism is established, the review cannot be pursued; neither would it constitute an "internal remedy" that would be exhausted before recourse to judicial review, as contemplated by section 7(2) of PAJA.[18] The *mechanism* apparently refers to the organisational structure and procedures for the review. The Kwazulu Natal Provincial Treasury has established such mechanism;[19] but the

[11] 5 3 1 2 2. See also 6 11 2 below.
[12] Heading to regulation 16A9 reads "Avoiding abuse of supply chain management system". "SCM" is discussed in 3 2 1 1 above.
[13] Contextually connotes adjudication.
[14] The Treasury also has powers to investigate procurement proceedings- discussed in chapter 8.
[15] See 3 2 3 above.
[16] See 5 3 1 2 2 above.
[17] See also Quinot "Supplier Remedies" in *Procurement Regulation* 312.
[18] See *DDP Valuers (Pty) Ltd v Madibeng Local Municipality* [2015] ZASCA 146 18.
[19] Through the Bid Appeals Tribunal Practice Note No SCM-07 of 2006.

National Treasury is yet to. Although there is the Office of the Chief Procurement Officer, it is currently not conducting external review. This is a major weakness of this review option.

6 3 Cause of action

The factual situations that entitle a person to external review under the various aforementioned laws are examined here.

6 3 1 Nigeria

The cause of action required for external review under section 54(3) of the PPA is largely the same as required for the internal review; as the former is an appeal from the latter. In other words, the complainant must, first, adduce facts which establish that the procuring entity made an omission or took an action or decision that contravened the PPA, any applicable regulations or guidelines, or the provisions of bidding documents.[20] Secondly, the complainant must establish that it initially submitted a complaint to the procuring entity's accounting officer, but was not satisfied with the decision given, or, that the accounting officer failed to give a decision within prescribed deadline.[21]

Examples of facts which severally constitute the first element of the cause of action include: a procuring entity using a procurement method other than the one prescribed by the guidelines; using evaluation criteria different from those stated in the solicitation/bidding documents; awarding contract to a bidder other than the lowest evaluated responsive bidder.[22] Once it is proved that a provision of the applicable regulatory frameworks was breached, the complainant will not need to prove that he suffered any injury or damage resulting from the breach.[23] If the complainant had exhausted internal review, filing for external review will be deemed as dissatisfaction with the internal review decision or indecision, and fulfilment of the second element. The BPP's *Standard Operating Procedure: Administrative Review* (2015)[24] requires confirmation that there was recourse to internal review; but does not require the complainant to disclose grounds for his dissatisfaction with the internal review decision.

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[20] Section 54(1). See 5 3 3 1 above; also, BPP *Standard Operating Procedures for Enforcement and Compliance (Abridged Version: Administrative Review)* 2007 para 7(b).

[21] See PPA s 54(2), (2)(c) and (3).

[22] See for example *Cupero Nigeria Limited v Federal Ministry of Water Resources* FHC Abuja 12-6-2012 suit no FHC/Abj/CS/867/11.

[23] PPA s 54(1). See also 5 3 3 1 above.

[24] Paragraphs 3 and 7 respectively.

The two elements ought to be established for a complainant to be entitled to external review remedies. Notwithstanding, it has been observed that the external review forum occasionally entertains review cases that were not first submitted for reconsideration to the accounting officers.[25] Such isolated cases may be administratively convenient and acceptable to the parties; yet they contravene section 54(2) of the PPA and forestall the opportunity for a resolution at a less disruptive internal review stage. However, the BPP generally refers complaints, that were not submitted for internal review, to the accounting officers concerned.[26]

6 3 2 South Africa

6 3 2 1 Municipal SCM Regulations

It is essentially the same cause of action required for internal review under this regulation that is required for the external review.[27] In other words, a complainant only needs to prove that he is *aggrieved* by a decision or action taken in operating the municipality's SCM system. This entails that the complainant must have been harmed or some of its legal rights were adversely affected by the challenged decision or action. An example is where a contracting authority unlawfully excluded the complainant from the bidding process.

6 3 2 2 Treasury Regulations

What entitles a person to pursue a review under regulation 16A9.3 (a) is to allege non-compliance with the minimum SCM norms and standards prescribed by the Treasury Regulations. The complainant would have to identify the particular facts in the procurement decision or action that constitute the non-compliance. For example, these would constitute non-compliance: (a) a procuring entity accepts a bid where the supplier has outstanding tax obligations;[28] (b) using a procurement method not approved by the National Treasury for such contract value.[29]

[25] From the author's observation from handling procurement review cases.
[26] See 5 3 6 1 above.
[27] See 5 3 3 2 2 above.
[28] See reg 16A9.1(d).
[29] See reg 16A6.1.

6 4 Who may initiate review proceedings?

The extent to which a bidder may exercise a general right to challenge an act or decision of a procuring entity before the respective external review forum is examined here.

6 4 1 Nigeria

As seen above, a bidder that pursued internal review under section 54(2), but is not satisfied with the procuring entity's review decision or its indecision may apply for external review.[30] However, any other bidder in the challenged procurement may validly apply for external review; especially one who is adversely affected by the internal review decision. An example is a successful bidder whose contract award was rescinded by the internal review. It is assumed that the procuring entity will hardly have cause to apply for external review, since its accounting officer would usually not make a review decision that the procuring entity will not accept.

6 4 2 South Africa

6 4 2 1 Municipal SCM Regulations

Generally, it is a complainant or respondent(s) in an earlier internal review instituted in terms of regulation 49 that may initiate an external review under regulation 50(5) and (6). The municipality's accounting officer may also refer the matter to the provincial treasury if the independent adjudicator[31] is unable to complete the internal review within the stipulated 60 days.[32] Similarly, the provincial treasury may refer a procurement complaint before it to the National Treasury, if it cannot resolve the matter.[33]

6 4 2 2 Treasury Regulations

The persons that are entitled to file complaints under this regulation are not specified. However, it may be construed that the right to submit complaints is limited to only persons with direct interest in the procurement process; that is, actual and potential bidders. This aligns with the rule of *locus standi* applied by South African courts;[34] which holds that a person who claims

[30] Section 54(3).
[31] See 6 3 2 1 .
[32] See reg 50(5)(a).
[33] See reg 50(6).
[34] See *Cabinet of Transitional Government for Territory of South west Africa v Eins* [1988] ZASCA 32; [1988] 2 All SA 379 (A) 19-27; *Roodepoort-Maraisburg Town Council v Eastern Properties Ltd* 1933 AD 87 101;

relief in respect of any matter must, as a general rule, establish that he has a direct interest in that matter, and not merely the interest which all citizens have.

6 5 The forum

The nature and composition of the external bodies authorised to entertain administrative reviews in Nigeria and South Africa are examined here, vis-à-vis the model provided under the UNCITRAL Model Law. The Model Law emphasises that this body should be independent;[35] which contextually means "independence from the procuring entity rather than independence from the government as a whole and protection from political pressure."[36] An administrative body that has the authority to approve certain actions or decisions of or procedures followed by the procuring entity, or to advise it on procedures, is not regarded as independent.[37] Independence is important as a practical matter; for if the review lacks independence, a further challenge to the court would likely result, causing lengthy disruption to the procurement process.[38]

6 5 1 Nigeria

As earlier hinted in chapter 5, appeals from the procuring entity's reconsideration go to the BPP, Nigeria's federal procurement regulatory agency. The general nature and composition of BPP were discussed in chapter 3. [39] However, specific issues related to its review functions and independence in the foregoing context are analysed here.

The BPP's Certification and Compliance Monitoring (CCM) Department and a committee comprised of the management staff handle the Bureau's review functions.[40] The Director/Deputy Director of the department assigns an official to review specific cases and write a report; after which the committee considers the report and takes further actions;[41] examined in detail at 6 7 1 below. This arrangement affects the nature of BPP's review

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Dalrymple v Colonial Treasurer 1910 TS 372 390; *Geldenhuys and Neethling v Beuthin* 1918 AD 426 441; *Ex parte Mouton* 1955(4) SA 460 (A) 463 H.

[35] Chapter VIII.

[36] Guide to Enactment commentary 24 on chapter VIII at p 233.

[37] Commentary 24. An independent body envisaged by the Model Law is somewhat akin to Kenya's Public Procurement Administrative Review Board, a special administrative body whose exclusive competence is entertaining procurement administrative review. See Udeh *PPLR* (2013) 187-188; Quinot "Supplier Remedies" in *Procurement Regulation* 311.

[38] Commentary 24.

[39] 3 3 1.

[40] BPP *SOP: Administrative Review* paras 2, 3, 9, 15.

[41] BPP *SOP: Administrative Review* para 2, 3 and 5.

proceedings. Assigning the task of initial assessment of the complaint to an officer that is not easily identifiable to the public may reduce the chances of reaching out to and influencing the officer.[42]

The BPP's review may be affected by its function of certifying certain value of procurement, for compliance with applicable rules before procuring entities could award the contract.[43] The BPP would likely be biased towards upholding the procurement it had initially certified as compliant. This perception may reduce the confidence of some aggrieved bidders in the BPP's review of such cases. It may have led some bidders to undertake judicial review; sometimes even without exhausting the administrative reviews- resulting in the dismissal of such suits.[44]

Nevertheless, the BPP is independent of procuring entities and is not directly involved in their procurement proceedings; which is an advantage to the external review. Note however that the BPP purchases for its own needs. Procurement complaints in such instance would lie to the BPP's Director General in the form of internal review,[45] pursuable subsequently to the Federal High Court.

6 5 2 South Africa

The external review forums under the Municipal SCM Regulations and the Treasury Regulations are the same; they are the National Treasury and the various provincial treasuries. The only distinction is that under the Municipal SCM Regulations, appeals lie from a provincial treasury to the National Treasury; whereas, under the Treasury Regulations, complaints go either to the National Treasury or Provincial Treasury, depending on whether the respondent is a national or provincial procuring entity. The general nature and composition of the National Treasury, and some aspects of provincial treasuries, were discussed in chapter 3.[46] However,

[42] Public procurement is regarded as susceptible to corruption. See Williams-Elegbe *Corruption in Public Procurement* 25; Williams-Elegbe "Corruption and Public Procurement in Africa" in *Public Procurement Regulation* 345-347; and generally, Soreide *Corruption in Public Procurement*; S Kelman *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance* (1990); F Anechiarico & J Jacobs *The Pursuit of Absolute Integrity: How Corruption Control makes Government Ineffective* (1996) ch 8.

[43] See PPA s 5(c), and FGN circular SGF/OP/I/S.3/VIII/57 of 11-3-2009; also 3 3 1 above.

[44] See *Ofscon Nig Ltd v Min of Niger Delta* Affairs FHC 21-03-2012 suit no FHC/Abj/CS/315/2011; A.*C Egbe Nig Limited v DG BPP* FHC 21-07-2010 suit no FHC/B/CS/116/2010.

[45] Thus, susceptible to all issues inherent in this form of review, including forum's lack of independence.

[46] 3 3 2.

specific issues that relate to their review functions and independence in the foregoing context are analysed below.

The Office of the Chief Procurement Officer (OCPO) is the presumptive organisational structure within the National Treasury for the external review, as it is responsible for South African SCM policy monitoring and compliance.[47] Some provincial treasuries have organisational structure vested with external review function; for example, the Gauteng Department of Finance: Treasury Division.[48] The KwaZulu Natal Bid Appeal Tribunal, established in terms of Treasury Regulations 16A9.3, is another example; and it has entertained some related cases. However, the OCPO is yet to handle cases brought pursuant to the Municipal SCM Regulations 50(6) and the Treasury Regulations 16A9.3.[49] This may be owing to the weaknesses of these review mechanisms, identified above.[50]

The treasuries are independent of contracting authorities and generally do not participate directly in their procurement; except when the National Treasury facilitates transversal term contracts and when provincial treasuries approve contracts awards or recommendations.[51]

6 6 Lodging complaints and the timeframe

The issues examined here include: timeframe for applying for external review, implications of applying out of time, and whether extension of time is permitted.

6 6 1 Nigeria

Appeal to the BPP must be made within ten working days from the date of communication of the internal review decision.[52] This timeframe arguably offers the bidder ample time to prepare and submit his appeal. It may be argued that for this time to start running, the internal review decision must be communicated formally by the procuring entity; for example, through a written notice of the decision.[53] However, if the aggrieved bidder becomes aware of the

[47] SA National Treasury *2015 Public Sector Supply Chain Management Review* (2015) 6.
[48] See Gauteng Provincial Government: Supply Chain Management Policy Model (2015/2016) para 19.2. This paragraph is an adaptation of the Municipal SCM Regulations 50(5) and (6),
[49] This is according to an email response from the OCPO on 5-11-2016 to an enquiry from the author.
[50] 6 2 2.
[51] See 3 2 3 and 3 3 2 above.
[52] PPA 54(3).
[53] A party to an adjudicatory proceeding is generally entitled to a formal communication of the decision: CFRN 1999 s 294(1).

decision through a reliable but informal means,[54] he need not wait for a formal communication before filing the appeal. The fact that the timeframe depends on communication of the procuring entity's internal review decision confirms that BPP's review is intended only as a second instance review. That is why the submission timeframe for external review under the PPA is structured differently from the one under the Model Law,[55] which permits external review as a first recourse.

The PPA does not allow for extension of appeal submission time. Thus, an appeal brought outside the stipulated time may be rejected by the BPP. However, it has been observed that the BPP is not strict on enforcing timeline for lodging appeals.[56] It would rather, redress identified breach of procurement rules notwithstanding that related appeal is filed outside time.[57]

6 6 2 South Africa

The Municipal SCM Regulations and the Treasury Regulations do not specify a timeframe within which to refer a complaint to the relevant treasuries. A complaint may thus be referred to these forums at any time deemed reasonable by the applicant and acceptable by the forums. Since it is not time-bound, applicants may not feel compelled to promptly lodge complaints. This is a major weakness of these external review options. However, the treasuries or the procuring entities (specifically, the municipalities under the Municipal SCM Regulations) may stipulate relevant timeframes through issuing Practice Notes or SCM policy, respectively. For example, the KwaZulu Natal provincial treasury practice note prescribes the submission of complaints within five working days from the notification of award.[58]

6 7 The proceedings

The procedures and timeframes for completing external review proceedings are examined here. The element of effectiveness assessed is the ability to proceed swiftly within a reasonably short period of time, which should be measured in terms of days and weeks in the normal course.

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[54] Such as where a staff of the procuring entity tells him of the decision. See the South African case, *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality* [2014] ZAECGHC 55, [2014] 3 All SA 560 paras 40-43, where similar view was held by the court.

[55] Article 67(2).

[56] Author's observation of review proceedings.

[57] It may be deemed that such review decision was taken pursuant to BPP's general procurement investigative and enforcement powers under PPA s 53(4), which is not time-bound; discussed in detail in chapter 8.

[58] Practice Note No SCM-07 of 2006 para 3.2.

The extent of suppliers' access to procurement records in both jurisdictions, which is relevant here, was discussed in chapter 5.

6 7 1 Nigeria

(a) Review procedure

A complaint is submitted to the BPP by the complainant-bidder in the form of a formal written petition; which must indicate: (1) the procuring entity and the procurement proceeding petitioned against; (2) the alleged breach of relevant legislation; and (3) that the complaint has been copied to the procuring entity concerned.[59] The complaint is usually accompanied by supporting documents. The claims need not and is usually not supported by affidavit, as the law of evidence is relaxed in this proceeding.[60]

On receiving the complaint, the BPP writes the procuring entity to suspend any further action on the procurement until the matter is settled.[61] It will direct the procuring entity to furnish it with the comprehensive records of the affected procurement, and to reply in writing to the petition within five working days, if the entity is situated within the Federal Capital Territory (FCT) Abuja, and 15 working days, if it is situated outside the FCT.[62] The CCM Department will conduct (through an official appointed for the task) an initial assessment of the complaint and afterward reports to the committee, which will adopt a common position on the complaint.[63] Before taking any decision on a complaint, the BPP shall notify all interested bidders (those that participated in the affected procurement) of the complaint; and, may take into account representations from them.[64] However, BPP had in some cases failed to notify interested bidders; and the court invalidated the affected review decision when appealed.[65]

Where the BPP deems fit, it may hold a right of reply meeting with the complainant and the procuring entity (interested bidders, especially the successful bidder, may be invited) to resolve the dispute. The meeting is usually for the parties to resolve identified conflicting facts or issues relating to the challenged procurement. Except in exceptional circumstances,

[59] BPP *SOP: Administrative Review* para 7.
[60] See Nigerian Evidence Act 2011 s 256(1).
[61] PPA s 54(4)(a).
[62] PPA s 54(4)(a) and (5); BPP *SOP: Administrative Review* para 8.
[63] BPP *SOP: Administrative Review* para 5.
[64] PPA s 54(5).
[65] See for example *Cupero Nigeria Limited v Federal Ministry of Water Resources* FHC Abuja 12-6-2012 suit no FHC/Abj/CS/867/11.

each complaint is entitled to only one right of reply meeting.[66] Each party is given a fixed time to speak or present additional documents on its complaint or rebuttal.[67] Afterwards,[68] the BPP will make a binding decision, stating its reasons and remedies granted, if any; and will communicate it in a letter to the parties.[69] It relies on the parties' written representations, supporting documents or records, and deliberations during the meeting (if held).[70]

(b) Review timeframe

The decision of BPP has to be made within 21 working days after receiving the complaint.[71] This aligns with the ability to proceed swiftly within a reasonably short period of time.

However, there have been concerns about whether the BPP could complete within deadline, the review of several cases that may simultaneously come before it.[72] Actually, the BPP has completed numerous review cases within the deadline; while in numerous others, its review lasted beyond the prescribed time.[73] Although extending reviews beyond the deadline is contrary to the PPA; parties usually acquiesce and abide by BPP's review decision,[74] instead of proceeding on appeal to the court. Parties may do so to avoid the long and costly process of court action.

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[66] BPP *SOP: Administrative Review* para 16.

[67] BPP *SOP: Administrative Review* paras 17-20. Lawyers may not be involved in the proceedings; however, the complaints and rebuttals are usually covertly written or guided by lawyers.

[68] Within seven working days of the right of reply meeting, if held.

[69] PPA 54(6); BPP *SOP: Administrative Review* para 25. See 6 8 below.

[70] BPP *SOP: Administrative Review* para 27.

[71] PPA 54(6).

[72] See A Eyo "Public Procurement Law in Ghana and Nigeria: Comparative Assessment of the Public Procurement Acts and the Lessons for Procurement Reform" (2011) unpublished paper presented at *Public Procurement Regulation in Africa Conference* hosted by the Centre for Human Rights Studies at the University of Stellenbosch, 26-10-1990 (copy on file with author)

[73] See BPP "3rd Quarter 2014 Petition" <http://www.bpp.gov.ng/index.php?option=com_joomdoc&view=documents&path=3RD+QTR+Petitions+July+-+Sept+2014.pdf > (accessed 22-10-2017). For example, s/n 4, 7 & 8, therein show petitions that were still ongoing as at the time of publishing the report, which apparently was 3 months or more after the petitions commenced. Completing review cases within deadline calibrated in days is a challenge that review forums in other jurisdictions face; see Udeh (2013) PPLR 193.

[74] On effect of acquiescence as an estoppel, see *Halsbury's Laws of England* 4th ed para 1473 pg 994: "The term (acquiescence) is however properly used where a person having right, and seeing another person about to commit or in the course of committing an act of infringing upon that right, stands by in such a manner as really to induce the person committing the act and who might otherwise have abstained from it, to believe that he assents to its being committed, a person standing by cannot afterwards be heard to complain of the act." See also *Fagbemi v Aluko* (1968) 1 All NLR 233 237; *Kayode v Odutola* (2001) 11 NWLR (Pt 725) 659 679.

6 7 2 South Africa

(a) No review procedure and timeframe

Both regulations under consideration do not stipulate any procedural rules or timeframes for their respective external review provisions. Moreover, related procedures have not emerged from practice, since the weaknesses of these external review options discourage recourse to them. Notwithstanding, procedures could be established for the review proceedings, as suggested below, if these external review options are to be made viable.

(b) Establishing procedures and timeframes

Procuring entities' SCM policy documents or the treasuries' administrative regulatory instrument, such as instruction or practice notes,[75] could be used to prescribe procedures and timeframes for both review options. In the very unlikely case that an external review application in terms of any of the regulations is submitted, the review procedure could involve the relevant treasury calling for or relying on the submitted procurement documents. It could further invite written responses from the procuring entity involved; even from any bidder that may be affected by the review decision. The reviewing treasury would thus give its decision by considering the claims vis-à-vis documentation and representations submitted. The decision would be communicated in writing to the parties involved.[76] It is advisable that the review timeframe be a reasonably short period of time, within days and weeks. An example is the KwaZulu Natal Provincial Treasury Practice Note on Bid Appeal Tribunal,[77] which prescribed fourteen working days for the finalisation of its external review proceedings.

6 8 Available remedies and enforcement

The extent to which the various external review forums may intervene and redress breaches in procurement proceedings, and whether these satisfy the elements of effectiveness that relate to available remedies are considered here. The relevant elements include: (a) the possibility of intervention without delay by the body; (b) the body has power to suspend or cancel the procurement proceedings and to prevent in normal circumstances the entry into force of a procurement contract while the dispute remains outstanding; (c) the power to implement other interim measures, such as giving restraining orders and imposing financial sanctions for non-

[75] See 4 3 1 3 (b) above.
[76] See PAJA s 5.
[77] Practice Note No SCM-07 of 2006 paras 3 & 6.

compliance; (d) the power to award compensation if intervention is no longer possible; (e) decisions of review body are binding; (f) available remedies meet system's needs; and, (g) decisions/remedies given can be easily enforced by a fast and simple mechanism.

6 8 1 Nigeria

On receiving a complaint, the BPP is statutorily required to intervene without delay by ordering the suspension of further action on the challenged procurement until its review is completed.[78] The suspension prevents the entry into force of the procurement contract while the dispute is on-going; although the PPA does not exclude concluded contracts from review. Besides, in practice, the BPP could suspend the award or performance of a procurement contract. This falls within the ambit of its power to suspend "further action" by the procuring entity.[79] Unlike the Model Law,[80] the PPA does not allow BPP the discretion to refrain from suspending or to lift a suspension on consideration that urgent public interest requires the procurement proceedings or the contract to proceed. This rather automatic suspension is not ideal, since discretional suspension provides a balance between the right of bidders/contractors and the public interest in timely provision of certain services.

On reviewing the procurement, the BPP may either dismiss the complaint for lack of merit or grant the following remedies:[81]

(i) prohibit the procuring entity from taking any further action;

(ii) nullify in whole or in part an unlawful act or decision made by the procuring or disposing entity;

(iii) declare the rules or principles that govern the subject matter of the complaint; and

(iv) revise an improper decision by the procuring or disposing entity or substitute its own decision for such a decision.

As earlier noted,[82] the PPA does not provide for payment of compensation to bidders. This is akin to the position of South African courts, which refuse to grant damages to bidders against a contracting entity that breached procurement rules, except the entity acted in bad

[78] PPA s 54(4)(a).
[79] Williams-Elegbe (2012) *PCLJ* 361.
[80] Article 67(3) and (4).
[81] PPA s 54(4)(b).
[82] 5 3 8 1 above.

faith.[83] Argument supporting the disallowance of award of compensation/damages is presented in the next paragraph, and further in chapters 7 and 9.

Remedy (i) above may perpetually restrain the procuring entity from acting on the challenged procurement; unlike initial suspension of procurement proceedings that only lasts till the conclusion of review. This remedy may give rise to the BPP assigning the conduct of that procurement to another authority.[84] It also has the same effect as the power to implement other interim measures, such as giving restraining orders.[85] But, as seen above, the BPP does not have power to impose financial sanctions for non-compliance. This is acceptable, as imposition of financial sanctions on procuring entities or awarding compensation to bidders may be counter-productive, as it detracts from scarce public funds,[86] which Nigeria's procurement rules are primarily intended to protect (value for money).[87] Moreover, financial sanctions will hardly act as deterrence for non-compliance, as it is the government that pays, not the offending official(s).

Remedy (ii) above is akin to the power to cancel the offending procurement proceedings, which is part of effectiveness.[88] Remedy (iv) is broad, as it enables the BPP to make any decision it deems suitable for each case to substitute the procurement decision. Generally, the above external review remedies correspond with those prescribed by the Model Law.[89]

The BPP's remedies are binding; and enforceable by a fast and simple mechanism. The mechanism includes: (1) withholding the certification required by the government to pay for contracts of certain value;[90] (2) applying administrative sanctions (including, the temporary transfer of the procurement functions of the procuring entity to an agency or consultant);[91] and,

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[83] Discussed in detail in ch 8. Meanwhile, see *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC); *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA); and Malan J.'s remarks in *Digital Horizons (Pty) Ltd v SA Broadcasting Corporation* (2008/19224) [2008] ZAGPHC 272 (08-09-2008); Quinot (2008) *Stellenbosch Law Review* 101; Quinot (2011) *PPLR* 204; and, Quinot "Supplier Remedies" in *Public Procurement Regulation* 329.

[84] See PPA s 6(1)(i)(iv).

[85] See element (c) in 6 8 above.

[86] See Quinot "Supplier Remedies" in *Public Procurement Regulation* 330; Quinot (2011) *PPLR* 204-205.

[87] See PPA s 16(1) (d)-(f); Udeh & Ahmadu "Nigeria" in *Procurement Regulation* 143-144. See also Quinot & Arrowsmith "Introduction" in *Public Procurement Regulation* 8; Arrowsmith *Public and Utilities Procurement* 2-5; Arrowsmith, Linarelli & Wallace *Regulating Public Procurement* 15, 28-31.

[88] See element (b) in 6 8 above.

[89] Article 67(9).

[90] PPA ss 5(c) & 6(1)(b).

[91] With the approval of the National Council on Public Procurement; see PPA ss 5(n) and 6(1)(i).

(3) involving relevant law enforcement authorities.[92] Also, the BPP can report a procuring entity that fails to comply with its review decision to the Federal Executive Council,[93] to use political pressure to compel compliance. Besides, where a procuring entity refuses to comply with the decision of BPP, an interested bidder may proceed to the Federal High Court to compel the entity to act accordingly.[94]

The remedies above arguably meet system's needs, as they can adequately correct breaches in procurement and protect bidders' rights. In addition, they largely match the relevant elements of effectiveness as seen above.

6 8 2 South Africa

6 8 2 1 Municipal SCM Regulations

The Regulations does not indicate the remedies that the treasuries may grant and the remedies under section 8 of PAJA do not apply in this circumstance, as they relate exclusively to judicial review. However, regulation 50(6) refers to "resolve/resolution" of the matter by the treasuries; which arguably entails exercising powers incidental to their regulatory functions to redress breaches in procurement. Such may include stopping, varying or overturning the challenged procurement decision or action; but would hardly include award of compensation.[95] Also, it could mean that the treasuries may adopt a conciliatory approach between the contracting authority and the interested bidder(s) towards addressing the complaint. Notwithstanding, these external review options do not constitute effective bidder remedies,[96] considering their weaknesses,[97] and that the legislation does not have provisions that correspond to the relevant elements of effectiveness under 6 8 above.

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[92] See for example PPA s 53 particularly subs (5).

[93] See Constitution ss 144(5) & 148 for composition of the FEC. See 3 3 1 above for relationship between BPP and FEC.

[94] See *Cupero Nigeria Limited v Federal Ministry of Water Resources* FHC Abuja 12-6-2012 suit no FHC/Abj/CS/867/11.

[95] See Quinot "Supplier Remedies" in *Public Procurement Regulation* 329; Quinot (2008) *Stellenbosch Law Review* 101; Quinot (2011) *PPLR* 204-205. See also, *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC); *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA); and Malan J.'s remarks in *Digital Horizons (Pty) Ltd v SA Broadcasting Corporation* (2008/19224) [2008] ZAGPHC 272 (08-09-2008).

[96] See *DDP Valuers (Pty) Ltd v Madibeng Local Municipality* [2015] ZASCA 146 18 & 20; and, Bolton (2010) *PELJ* 73.

[97] Particularly as seen here and in 6 7 2 above.

6 8 2 2 Treasury Regulations

The National Treasury and each provincial treasury are directed only to make recommendations of "remedial actions" to be taken if there is non-compliance with any procurement norms and standards; including recommending criminal proceedings against alleged corruption, fraud or other offences.[98] The weaknesses of the remedy available under this regulation are that: (1) the mechanism for review would have to be put in place first before a review proceeding and its decision may arise; (2) the review decision is given as a recommendation; (3) thus, it is not automatically binding and enforceable; (4) the regulation does not identify who the recommendation is to be made to and what the recommendation will give rise to; and, (5) it does not identify the available remedies.

However, it is arguable that "remedial actions" to be recommended, is wide enough to incorporate any reasonable action that will redress the non-compliance. This may include: suspending the procurement proceedings, cancelling the contract, re-awarding the contract; but may not include award of compensation, as argued under the Municipal SCM Regulations above. Although not stated, the recommendation may most likely be made to the accounting officer of the contracting authority, pursuant to regulations 16A9.1 and 16A9.2; or to a higher authority.[99] These regulations vest the accounting officer with powers to, among others: take all reasonable steps to prevent abuse of the supply chain management system; reject a bid from an offending bidder; and cancel a procurement contract which bidding process was marred by irregularities.

Where the requisite review mechanism is established, and a recommendation is made, it would most likely be followed, considering the authoritative position of the treasuries.

As currently provided, the external review options under the Treasury Regulations do not constitute effective remedies owing to the inherent weaknesses.[100]

6 9 Right of appeal

In Nigeria and South Africa, appeals from the external review forums can be made to courts of competent jurisdiction, to the extent permitted by relevant laws. Such judicial recourse is not a full appeal but a review proceeding. For Nigeria, it is by virtue of section 54(7) of the PPA.

[98] Regulations 16A9.3(b). The criminal aspect is discussed in ch 8.

[99] The KwaZulu Natal Province Bid Appeal Tribunal makes recommendation to the Members of the Executive Council for Finance and Economic Development: Practice Note SCM-07 of 2006 para 6.1(b).

[100] See *DDP Valuers (Pty) Ltd v Madibeng Local Municipality* [2015] ZASCA 146 18 & 20; and, Bolton (2010) *PELJ* 73.

In the case of South Africa, although it is not expressly provided under the two regulations, suppliers have inherent right to judicial review of the challenged procurement decisions; as they are subject to general principles of administrative law.[101] In fact, the review options under both regulations need not be exhausted before recourse to judicial review, as they do not constitute effective internal remedies.[102]

A detailed look at judicial recourse in both jurisdictions is undertaken in the next chapter.

6 10 Summary of basic features of the external administrative review regimes

A summary of the basic features of the external review mechanisms in both systems are set out below.

Features	Nigeria	South Africa
Enabling legislation	PPA section 54(3)	1. Municipal SCM Regulations 50(5) and (6) 2. Treasury Regulations 16A9.3
Cause of action	1. An omission or breach, contrary to the provisions of: the PPA, subsidiary legislation made pursuant to the Act, or bidding documents. 2. Internal review decision is unsatisfactory, or, the AO failed to give a decision within deadline.	1. Rights adversely affected by procurement decision (Regulations 50(5) and (6)). 2. Non-compliance with the minimum SCM norms and standards prescribed by the Treasury Regulations (Regulations 16A9.3).
Right to institute review	1. A complainant not satisfied with internal review decision. 2. Bidder(s) adversely affected by the internal review decision.	1(a) A complainant or respondent(s) in an earlier internal review instituted in terms of regulation 49 (Regulations 50(5) and (6)).

[101] Quinot *State Commercial Activity* 162; Quinot (2011) *PPLR* 195. See *CC Groenewald v M5 Developments* [2010] ZASCA 47 paras 2, 17, 27.

[102] See *DDP Valuers (Pty) Ltd v Madibeng Local Municipality* [2015] ZASCA 146 18 & 20; also, Bolton (2010) *PELJ* 73.

		(b) Municipal AO or the Provincial Treasury, if internal review is not resolved within a period. 2. Actual and potential bidders (Regulations 16A9.3).
Forum	The BPP	National Treasury and the various provincial treasuries
Commencement and timeframe	Within ten working days from the date of communication of the internal review decision.	Not specified by the Regulations; however, a Practice Note or SCM policy may specify a timeframe.
Review proceeding and timeframe	1. Written complaint and reply (with supporting documents) by the parties are considered in-camera by a committee of BPP officials. The committee may hold a meeting between the parties to resolve issues. 2. BPP gives a written decision, with reason, within 21 working days after receiving the complaint.	No prescribed procedure and timeframe; however, a Practice Note or SCM policy may prescribe the procedures and timeframe.
Available remedies	1. Suspend the procurement proceeding. 2. Prohibit the procuring entity from taking any further action. 3. Nullify in whole or in part an unlawful procurement action or decision.	1. Not specified (Regulations 50(5) and (6)). 2. Recommendation of remedial actions made (Regulations 16A9.3). (Ineffective)

	4. Revise or substitute an improper procurement decision. (Effective)	
Enforcement	1. Withholding No Objection Certification for the procurement. 2. Applying administrative sanctions. 3. Involving relevant law enforcement authorities.	Not definite; however, where resolution or recommendation is made, it may be complied with.
Opportunity for further review	Judicial review	Judicial review

6 11 Analysis and Conclusion

6 11 1 Nigeria external review mechanism: systematised and effective

The external review mechanism discussed above, as well as the previously considered internal review, apply only to Nigerian federal government procurement. However, many states in the federation model their administrative review mechanisms on the federal mechanism. This is because the procurement legislation of these states is adapted from the federal PPA.[103] Thus, most states provide for internal review by the procuring entity, followed by external procurement review by their respective public procurement regulatory agencies, as obtained at the federal level. However, these states' bidder remedies systems are not as active as that of the federal; apparently owing to the lower volume of contracts in the states, the lower competition for these contracts, and the less keenness of state contractors to pursue available remedies. Notwithstanding, these states' bidder remedies systems enjoy solid legislative foundation similar to the federal; what remains is invoking it.

Both the internal and external review mechanisms established by the PPA are well structured, with provisions for the essential components of a bidder remedies system.[104] The internal review dovetails into the external review; as without the former the latter would

[103] See 4 3 2 1 1 above.

[104] See 2 3 2 3 above for the components of a bidder remedies system.

generally not arise;[105] and the route (timeframe and minimum procedures) from the former to the latter are clearly defined. They are effective *internal remedies* that must be exhausted before recourse to the courts.[106]

As seen above, the external review mechanism substantially aligns with all the relevant elements of an effective bidder remedies system. Particularly, the remedies available under this mechanism are sufficiently broad and effective to protect bidders' right and enforce compliance with public procurement rules. The sizeable number of procurement review cases handled at this administrative stage,[107] compared to the few that proceed to the courts,[108] lends credence to the above favourable assessment.

Although, there are impediments to the effectiveness of this mechanism; they are quite minimal. The BPP's involvement in certifying contracts of certain value is, as seen above,[109] adverse to the independence of BPP in review proceedings; yet, it is not significant to diminish the effectiveness of the review. The BPP lack of discretion to refuse suspension of a challenged procurement proceeding, though disadvantageous, is mitigated by the brevity of the suspension period (21 working days).[110] Besides, the BPP, although mandatorily directed to order the suspension,[111] could in practice refrain from doing so for various reasons, including necessity or exigency. Without such suspension order the procurement can lawfully proceed despite the review process. As posited above, the disallowance of compensation and financial sanctions against the procuring entity in breach is supportable and aligns with local economic and social realities. However, it may be tenable to award damages where the procurement decision is tainted with bad faith, corruption or fraud; or where the only available remedy is damages.

Currently the BPP does not publish its review decisions.[112] This frustrates public access to the decisions, which could, among others, serve as precedent for determining subsequent review cases and assessing the viability of proposed ones.

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[105] See 5 2 3 above.

[106] See *Ofscon Nigeria Ltd v Min of Niger Delta Affairs* FHC Abuja 21-03-2012 suit no FHC/Abj/CS/315/2011; *Integrated Remediations Limited v Federal Ministry of Environment* FHC 14-11-2012 suit no FHC/Abj/CS/841/2010; *A.C Egbe Nig Limited v DG BPP* FHC 21-07-2010 suit no FHC/B/CS/116/2010.

[107] From BPP's document showing details and status of the petitions which it received from July-September 2014, in author's file.

[108] From available information from the registry of the Federal High Court headquarters, Abuja.

[109] 6 5 1.

[110] PPA s 54 (4)(a) and (6).

[111] PPA s 54(4)(a).

[112] Kenya's Public Procurement Administrative Review Board, which is a procurement administrative review forum, established by Kenya's Public Procurement and Disposal Act 2005 (modelled on the UNCITRAL Model

6 11 2 South African external review options: unsystematic and weak

A combination of the Municipal SCM Regulations and the Treasury Regulations, makes external procurement review available at all tiers of South African government. However, the external review under the Municipal SCM Regulations remains inchoate until the major weaknesses of its precursor, the internal review under regulation 49,[113] are addressed. This is because the external review right under the Municipal SCM Regulations is exercised as an appeal from the internal review forum under the Regulations. Thus, until the internal review mechanism is operative (through a municipal's SCM policy framework) the external review under the Regulations remains in limbo. Similarly, the external review under the Treasury Regulations remains inchoate until the respective treasuries (as done by the KwaZulu Natal Provincial Treasury) establish its implementing mechanisms as directed by the Regulations.[114] Also, the inherent weaknesses of the external review options under both regulations, especially not having defined remedies and procedures,[115] further render them ineffective and unviable.[116]

The Nigerian external review mechanism provides South Africa with useful lessons to rely on in restructuring its own mechanism. For example, the clear and effective remedies under Nigeria's external review could be adopted. This requires making the requisite municipal SCM policy, and reviewing the Municipal SCM Regulations and the Treasury Regulations to enshrine such remedies.

6 11 3 Conclusion

The designs of the administrative review mechanisms in the two jurisdictions respectively affect their effectiveness. The Nigerian internal and external review mechanisms are well structured, as they possess the essential components of an effective bidder remedies system. Thus, many procurement review cases are resolved at these stages;[117] this consequently saves valuable time and resources that would have been spent on judicial review. The incoherently structured or unsystematised design of the South African internal and external review

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Law) comprehensively publishes its review decision on its secretariat's website: <http://www.ppoa.go.ke/2015-08-24-14-47-13/pparb-decisions> (accessed 22-10-2017).

[113] See 5 3 2 2 2 and 5 3 8 2 2 above.

[114] See 5 2 2 2 above.

[115] See 6 7 2 and 6 8 2 above.

[116] See *DDP Valuers (Pty) Ltd v Madibeng Local Municipality* [2015] ZASCA 146 18 & 20.

[117] The BPP handles up to 50 procurement petitions in a quarter (BPP's documents showing details and status of the petitions which it received at various periods of the years in issue, in author's file). Whereas, only a handful of procurement review cases, from inception of the PPA (2007) till date (01-02-2018), have been found from the Registry of the Federal High Court (court with review jurisdiction over federal public procurement).

mechanisms undermines their effectiveness.[118] As seen in 6 11 2 above, the structural weaknesses render the mechanisms inchoate, and act as disincentive to bidders from resorting to them. This has resulted in procurement review cases going frequently to the courts.[119] Many of these cases would have been resolved at the less disruptive administrative review stages.

Administrative review should be encouraged considering its advantages over judicial recourse. Some of these advantages are that: it is significantly less expensive and time-consuming;[120] it is less disruptive of the procurement process; it reduces the burden of cases on the courts, as some of the cases reviewed administratively may not proceed to court.[121] Notwithstanding, judicial recourse has its own exclusive advantages, enjoyed more in South Africa than in Nigeria, as would be seen in the next chapter.

Having presented the Nigerian and South African internal review mechanisms in the previous chapter, the consideration of the countries' external review mechanisms above concludes the discussion of procurement administrative review in both jurisdictions.

The next chapter looks at the countries' judicial remedies for breaches in public procurement.

[118] See Quinot "Supplier Remedies" in *Procurement Regulation* 311.

[119] See Nugent JA in *South African Post Office v De Lacy* 2009 (5) SA 255 (SCA) at [1]; Quinot (2011) *PPLR* 198.

[120] Apart from the fact that cases last for several months and even years in court, there is also a right of appeal to different hierarchy of courts in both jurisdiction; as would be seen in the next chapter.

[121] In Nigeria, there is a significantly higher number of cases handled at administrative review stages compared to the number of procurement cases heard by the courts.

Chapter 7

Judicial Remedies

7 1 Introduction

Judicial remedies entails seeking court's intervention against breaches or grievances arising from public procurement proceedings or review. In Nigeria, judicial recourse necessarily takes the form of an appeal to the court from the external administrative review forum (the BPP/Bureau).[1] Thus, judicial intervention is the last stage in Nigeria's sequential bidder remedies system. In South Africa, it is largely in the form of direct judicial review;[2] and, practically a discrete option to administrative review. For instance, pursuing administrative review under the Municipal SCM Regulations does not affect a person's right to seek judicial redress at any time.[3] Also, administrative review under the aforementioned regulation and the Treasury Regulations does not constitute *internal remedies* that must be exhausted before judicial review.[4] However, in municipal procurement, where the internal appeal under section 62 of the System Act applies, the court, as held in *DDP Valuers (Pty) Ltd v Madibeng Local Municipality*,[5] may require that the appeal must be exhausted before it intervenes.[6] Yet, by virtue of section 7(2)(c) of PAJA, litigants could apply to be exempted from exhausting internal remedies. Direct judicial recourse has made court's intervention in South African public procurement more active than it is in Nigeria.[7]

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[1] PPA s54(7); *Ofscon Nig Ltd v Ministry of Niger Delta* Affairs FHC(Abuja) 21-03-2012 suit no FHC/Abj/CS/315/2011 26-27; *Integrated Remediation Limited v Federal Ministry of Environment* FHC(Abuja) 14-11-2012 suit no FHC/Abj/CS/841/2010 30-39; *A.C Egbe Nig Limited v DG BPP* FHC(Benin) 21-07-2010 suit no FHC/B/CS/116/2010. See 6 2 1 above; Udeh & Ahmadu "Nigeria" in *Procurement Regulation* 152.

[2] Quinot "Supplier Remedies" in *Procurement Regulation* 312 and 314; Quinot (2011) *PPLR* 200-203.

[3] Regulation 50(7). See 5 3 1 2 2 above; and *DDP Valuers (Pty) Ltd v Madibeng Local Municipality* [2015] ZASCA 146 para 20.

[4] See *DDP Valuers (Pty) Ltd v Madibeng Local Municipality* [2015] ZASCA 146 para 18; and, 5 3 1 2 2 above.

[5] [2015] ZASCA 146 paras 23-25. Also in *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality* [2014] ZAECGHC 55; [2014] 3 All SA 560 (ECG) paras 72, 73, 79(3)(2). See 5 3 1 2 1 above.

[6] See PAJA s7(2)(a). However, in *Compass Waste Services (Pty) Ltd v Chairperson Northern Cape Tender Board* [2005] ZANCHC 4, [2005] 4 All SA 425 (NC); *Actaris South Africa (Pty) Ltd v Chairman of the Tender Committee* [2007] ZAFSHC 136; and, *Alexander Maintenance and Electrical Services CC v Nyandeni Local Municipality* [2012] ZAECMHC 10, judicial review was allowed without prior exhaustion of Systems Act s 62 appeal, notwithstanding that s 7(2)(c) of PAJA was not invoked. These cases predate the SCA's decision in *DDP Valuers case*.

[7] See 6 11 1 above. Also, Nugent JA in *South African Post Office v De Lacy* 2009 (5) SA 255 (SCA) para 1; Quinot (2011) *PPLR* 198-201; and, Quinot "Supplier Remedies" in *Procurement Regulation* 313-314.

With the above background, this chapter examines the components of the judicial recourse mechanism in both jurisdictions; such as the applicable laws, the forum, available remedies, among others. Some of these components are compared with the related elements of an effective remedies system. However, these systems are not compared with the UNCITRAL Model Law, as it does not prescribe procedures for judicial recourse.

7 2 Enabling laws

7 2 1 Nigeria

The PPA, section 54(7), established bidders' right to judicial recourse under the Nigerian federal procurement system, as follows:

> "Where the Bureau fails to render its decision within the stipulated time, or the bidder is not satisfied with decision of the Bureau, the bidder may appeal to the Federal High Court…"

Thus, the right to seek judicial intervention in Nigerian federal procurement is derived from and governed by public procurement legislation;[8] unlike in South Africa, as will be seen in 7 2 2 below. Prior to the PPA, suppliers had very limited right to judicial remedies against certain procurement decisions of government bodies, based on a few applicable common law principles of contract, tort or administrative law.[9] At that time, recourse to court was direct.[10]

Now, under the PPA, the right to judicial remedies has been enhanced, as any procurement decision contrary to the PPA or its regulations is actionable.[11] However, judicial intervention now has to wait until the administrative reviews are exhausted.[12] This does not violate the right to fair hearing and determination of civil rights by courts, under section 36(1) of the Constitution; since the courts' jurisdiction becomes available after administrative review.

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[8] See *Cupero Nigeria Limited v Federal Ministry of Water Resources* FHC(Abuja) 12-6-2012 suit no FHC/Abj/CS/867/11; *A.C Egbe Nig Limited v DG BPP* FHC(Benin) 21-07-2010 suit no FHC/B/CS/116/2010.

[9] See 2 2 2 above.

[10] See *CBN v System Application Products Nigeria Limited* (2005) 3 NWLR (Pt 911) 152.

[11] 2 2 2 above discusses how the existence of procurement regulation enhances bidder remedies.

[12] See *Ofscon Nig Ltd v Ministry of Niger Delta* Affairs FHC(Abuja) 21-03-2012 suit no FHC/Abj/CS/315/2011 26-27; *Integrated Remediations Limited v Federal Ministry of Environment* FHC(Abuja) 14-11-2012 suit no FHC/Abj/CS/841/2010 33-35; *A.C Egbe Nig Limited v DG BPP* FHC(Benin) 21-07-2010 suit no FHC/B/CS/116/2010.

An aggrieved bidder who goes straight to court risks foreclosing his right to a remedy, as the time for administrative review may have elapsed when the suit is dismissed.[13]

7 2 2 South Africa

The right to judicial review of public procurement decisions is not provided in the public procurement legislation; rather, it is based on general administrative justice provisions in the South African Constitution and the PAJA. Section 33(1) and (2) of the Constitution respectively enshrines "the right to administrative action that is lawful, reasonable and procedurally fair"; and, the right to be given written reasons where ones rights have been adversely affected by administrative action. Public procurement decisions by contracting authorities are regarded as "administrative action".[14]

On that premise, tenderers have the right to lawful, reasonable and procedurally fair procurement process/decision; and, written reason where they are adversely affected. What is *procedurally fair* depends on the circumstances of each case.[15] An example of a procedurally unfair procurement process is where award criteria are not disclosed to tenderers, resulting in vagueness.[16] A *lawful* and *reasonable* procurement process is one that complies with applicable legislation or principles; where the decision taken is rational. Thus, procurement must be competitive, and eligible tenderers must be free to bid and be treated equally,[17] by virtue of section 217 of the Constitution.[18] A procurement decision is justiciable if it "adversely affects the rights of any person and has a direct external legal effect".[19]

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[13] See *Ogiamien v Ogiamien* (1967)1 All NLR 191 208-209; *Ukpe Orewere v Rev Moses Abiegbe* (1974) 4 UILR (Pt 1) I 168 170; (1974) 9 SC; *Williams Ladega v Shittu Durosimi* (1978) 3 SC 91, (1978) All NLR 79 87; *Registered Trustees of Ijeloju Friendly Union v Kuku* (1991) 5 NWLR (Pt 189) 65 79; *Agbogu v Agbogu* (1995) 1 NWLR (Pt 372) 411.

[14] See PAJA s1(i); *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2014] ZASCA 21, [2014] 2 All SA 493 (SCA) paras 16-17; *Eskom Holdings v The New Reclamation Group* 2009 (4) SA 628 (SCA) para 11; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 21; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) paras 11-12; *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) para 5-14; *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) para11; Quinot (2011) *PPLR* 195 & 200; Quinot *State Commercial Activity* 162-163.

[15] PAJA s 3(2)(a).

[16] See *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* (2014 (1) SA 604 (CC), 2014 (1) BCLR 1 (CC)) [2013] ZACC 51, [2013] ZACC 42 para 88.

[17] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC) para 60; *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2014] ZASCA 21; [2014] 2 All SA 493 (SCA) para 17.

[18] And s 195(1): *Total Computer Services (Pty) Limited v Municipal Manager Potchefstroom Local Municipality* [2007] ZAGPHC 239, 2008 (4) SA 346 (T) 21.

[19] This forms part of the definition of "administrative action" under PAJA s 1(i).

To give effect to the aforementioned rights, section 33(3)(a) of the Constitution[20] directs that national legislation "must provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal". In response, section 6(1) of PAJA provides that: "Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action." Based on this, tenderers have a right to the judicial review of public procurement decisions; provided they exhaust applicable internal remedies.[21] On the whole, the courts' power to review procurement decisions (administrative action) no longer flows directly from common law, but from the Constitution and PAJA.[22] Nevertheless, courts still apply common law rules to review.[23]

7 3 Scope of judicial remedies

As seen in 7 2 above, the Nigerian PPA refers to an *appeal* to the court; while the South African Constitution and PAJA provide for judicial *review* of administrative action. The dividing line between an appeal and a review may sometimes be blurred;[24] yet, there are still distinctions between the two,[25] with practical implications. First, a court entertaining an appeal must hear the matter on the merits and could substitute its own determination for that of the original decision-maker.[26] In judicial review, value judgments may be made, which will, almost inevitably, involve the consideration of the merits of the matter in some way or another. However, the judge does not enter the merits in order to substitute his/her own opinion on the correctness thereof; rather, it is to determine whether the outcome is rationally justifiable.[27]

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[20] Section 34 grants everyone access to courts for the fair hearing and resolution of any dispute by the application of law.

[21] PAJA s 7(2)(a).

[22] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affair* [2004] ZACC 15, 2004 (4) SA 490 (CC).

[23] See Quinot (2011) *PPLR* 195; Quinot *State Commercial Activity* 134-211.

[24] Baxter *Administrative Law* 306; JR de Ville *Judicial Review of Administrative Action in South Africa* (2003) 387–388; Hoexter *Administrative Law* 106; *Konyn v Special Investigating Unit* 1999 (1) SA 1001 (TkH); *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) para 31.

[25] See H Barnett *Constitutional and Administrative Law* 7ed (2009) 691-693. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* [2004] ZACC 15, 2004 (4) SA 490 (CC) 513 C-D para 45; *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) 589 – 590 para 32; *Emergency Medical Supplies and Training CC t/a EMS v Health Professions Council of South Africa* [2011] ZAWCHC 393 paras 83-97.

[26] See *Tickly v Johannes N.O* 1963 (2) SA 588 (T) 593G-594A; *Emergency Medical Supplies and Training CC t/a EMS v Health Professions Council of South Africa* [2011] ZAWCHC 393 para 89; P Cane "Merits Review and Judicial Review- the AAT as Trojan Horse" (2000) 28 *Federal Law Review* 213.

[27] *Carephone (Pty) Ltd v Marcus NO* 1999 (3) SA 304 (LAC) para 36; *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* [2006] ZASCA 175, [2007] 1

Secondly, appeal and review are pursued on different grounds.[28] Review grounds are narrower than appeal grounds.[29] Thirdly, the standard of review in an appeal is higher than in a judicial review. For example, in judicial review, it is not required that a challenged decision must be substantively reasonable; whereas it may be warranted in an appeal.[30]

Having identified the nature of an appeal and judicial review, it is apposite to determine which applies to procurement judicial recourse within these jurisdictions. Also considered below are: the subject-matter of challenge (whether it is the original procurement decision or the administrative review decision); the stages of procurement subject to review; and, the pre-conditions for pursuing judicial recourse.

7 3 1 Nigeria

The PPA's reference to "appeal" in section 54(7) arguably indicates that the recourse to court arises as a further protest, following BPP's administrative review; as the court does not actually treat procurement cases as an *appeal*. In practice, the jurisdiction it exercises under section 54(7) "is largely, if not strictly, one of review".[31] Also, the available remedies are essentially those derivable from review.[32] However, as would be seen below,[33] not all rules applicable to judicial review apply to proceedings arising from section 54(7). Furthermore, judicial recourse could take the form of a writ of summons proceeding instead of a review.

The PPA does not specify whether it is the procurement or the administrative review decision that the court will review. However, in *Ofscon Nigeria Ltd v Ministry of Niger Delta Affairs*[34] it was held that the role of the court under section 54(7) is to review the decisions, or

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All SA 164 (SCA), 2007 (1) SA 576 (SCA) para 32, 47; C Hoexter "Standards of Review of Administrative Action – Review for Reasonableness", in J Klaaren (ed) *A Delicate Balance: The Place of the Judiciary in Constitutional Democracy – Proceedings of a Symposium to Mark the Retirement of Arthur Chaskalson* (2006) 68-69.

[28] See 7 4 below. Also, *Emergency Medical Supplies and Training CC t/a EMS v Health Professions Council of South Africa* [2011] ZAWCHC 393 para 94-97; *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) para 32.

[29] *Syntell (Pty) Ltd v City of Cape Town* [2008] ZAWCHC 120 para 75.

[30] *Trinity Broadcasting (Ciskei) v Independent Communications Authority of SA* 2004 (3) SA 346 (SCA) para 20; *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) para 32; *Emergency Medical Supplies and Training CC t/a EMS v Health Professions Council of South Africa* [2011] ZAWCHC 393 para 96.

[31] *Ofscon Nigeria Ltd v Ministry of Niger Delta Affairs* FHC(Abuja) 21-03-2012 suit no FHC/Abj/CS/315/2011 41.

[32] Discussed at 7 9 1 below.

[33] 7 7 1.

[34] FHC(Abuja) 21-03-2012 suit no FHC/Abj/CS/315/2011 40.

lack of it, of both the procuring entity and the BPP. Thus, the applicant can apply for the review of any or both decisions.

Judicial intervention may be sought to review the original procurement decision instead of the administrative review decision in the following instances: (1) the review forum fails to give its decision within the review deadline; (2) the forum decides that it will not assume jurisdiction over the complaint; and (3) the applicant feels that the forum did not address the issues raised.[35] The above is permissible, as what is involved is not an appeal (within courts) but a recourse to court after exhausting internal/administrative remedies.

Every stage of procurement is subject to judicial review, provided there is a breach of the PPA or any applicable regulatory frameworks. Nevertheless, a supplier wishing to judicially challenge the planning phase of a tender process may grapple with establishing ripeness of the matter and *locus standi*. This is because plans may be tentative; and section 54 proceeding is arguably accessible to those that participated in the challenged tender. Generally, disputes on contract administration are not covered under section 54.

Apart from the requirement to exhaust administrative review, there is no precondition for pursuing judicial remedies. The 30-day written notice that litigants must give to BPP before suing it, under section 14(1) of the PPA, does not apply to section 54(7) proceedings. First, section 14(1) relates to general court action against the BPP; while section 54(7) is exclusively on bidder remedies.[36] Secondly, the 30-day pre-action notice conflicts with section 54(7), which requires that judicial recourse must commence within 30 days after BPP's review deadline or decision. Thirdly, section 14(1) is subject and inapplicable to section 54(7). Non-service of pre-action notice was a successful ground of objection in *A.C Egbe Nig Limited v DG BPP*,[37] because the suit was neither brought under section 54(7) nor fulfilled its precondition.

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[35] See *DDP Valuers (Pty) Ltd* v *Madibeng Local Municipality* [2015] ZASCA 146 para 7 & 26; *Total Computer Services (Pty) Limited v Municipal Manager Potchefstroom Local Municipality* [2007] ZAGPHC 239; 2008 (4) SA 346 (T) paras 34 & 76. Also, *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* [2009] ZAWCHC 181; 2011 (3) SA 434 (WCC) paras 66 & 179; *Sgananda Consulting (Pty) Ltd v Mnambithi FET College* (4329/14) [2014] ZAKZPHC 28 para 4.

[36] See *Aqua ltd v Ondo State Sports Council* 1988 4 NWLR (pt 91) 622; *PPDC v National Agency for Food and Drug Administration and Control* FHC(Abuja) 15-12-2014 suit no FHC/ABJ/CS/760/13.

[37] FHC(Benin) 21-07-2010 suit no FHC/B/CS/116/2010.

7 3 2 South Africa

The form of judicial intervention in South African public procurement is not left to conjecture, as section 33(3)(a) of South African Constitution and section 6(1) of PAJA expressly state that it shall be by judicial review. South African courts are generally not vested with appellate authority over executive decisions.[38] Thus, the courts are only concerned with the legality of the tender process. They do not second-guess the contracting authority by imposing their views in the place of decisions lawfully made by the authority, however unpopular or ill-advised it might be regarded.[39] Besides, not every slip in administration of tenders necessarily attracts judicial sanction.[40]

In cases where direct judicial recourse applies, it is necessarily the original procurement decision that would be reviewed. Where administrative review was initially sought, judicial review may be pursued against the procurement decision,[41] or the administrative review decision,[42] or both. [43] The comments in 7 3 1 above on when judicial review may be sought against the original procurement decision apply here.

Public procurement planning and award decisions are both subject to judicial review in South Africa. Procurement planning is usually challenged together with the award decision, as bidders normally identify irregular planning decisions only during award.[44] Although rare and not quite clear, solely challenging planning decisions is possible.[45] For example, in *MEC for Education, Northern Cape v Bateleur Books (Pty) Ltd*,[46] the court reviewed a sole issue

[38] *City of Cape Town v South African National Roads Agency Ltd* (SANRAL) [2015] ZAWCHC 135; 2016 (1) BCLR 49 (WCC); [2016] 1 All SA 99 (WCC); 2015 (6) SA 535 (WCC) para 8.

[39] *City of Cape Town v SANRAL* [2015] ZAWCHC 135, 2015 (6) SA 535 (WCC) para 8 214-216; *Joubert Galpin Searle Inc v Road Accident Fund* 2014 (4) SA 148 (ECP) para 59; *South African National Roads Agency v The Toll Collect Consortium* 2013 (6) SA 356 (SCA) para 27. See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) paras 45-48; C Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 *SA Law Journal* 484 501-502.

[40] *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* [2010] ZASCA 13, 2010 (4) SA 359 (SCA) para [21].

[41] *DDP Valuers (Pty) Ltd* v *Madibeng Local Municipality* [2015] ZASCA 146 para 7 & 26; *Total Computer Services (Pty) Limited v Municipal Manager Potchefstroom Local Municipality* [2007] ZAGPHC 239; 2008 (4) SA 346 (T) paras 34 & 76.

[42] *CC Groenewald v M5 Developments* [2010] ZASCA 47 para 2.

[43] *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* [2009] ZAWCHC 181; 2011 (3) SA 434 (WCC) paras 66 & 179; *Sgananda Consulting (Pty) Ltd v Mnambithi FET College* (4329/14) [2014] ZAKZPHC 28 para 4.

[44] See *TBP Building & Civils v the East London Industrial Development Zone* [2009] JDR 0203 (ECG *Manong & Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape (No 2)* 2009 (6) SA 589 (SCA)).

[45] Quinot *PPLR* (2011) 201.

[46] [2009] ZASCA 33; 2009 (4) SA 639 (SCA); [2009] 3 All SA 127 (SCA).

concerning a contracting authority's planned change from using previously participating suppliers to purchasing directly, without notice. It set aside the decision/plan for procedural unfairness; since the suppliers established that they had a legitimate expectation of continued participation and had consequently invested money. Nevertheless, as is the case in Nigeria, a suit solely challenging procurement planning will contend with establishing ripeness of matter and *locus standi* (to show what the interest is, in the absence of tender invitation and award decision).[47] Likewise, bidder remedies do not apply to contract administration; as it falls under contract dispute resolution.

There is generally no special statutory precondition for instituting judicial review against procurement decision in South Africa. However, before seeking judicial review of a municipality's delegated authority's procurement decision, a bidder must exhaust the appeal under section 62 of Systems Act.[48] The mere lapse of the time for exhausting the internal remedy neither satisfies the duty to exhaust nor constitutes a ground for exemption.[49]

7 4 Grounds of review/trial

Application for judicial remedies is limited to particular grounds provided by the relevant legislation. They essentially describe the way in which a decision-maker has contravened the law. Applicants must rely on these grounds. For Nigeria, the grounds are provided under section 54(1) of PPA. For South Africa, they are listed under section 6(2) of PAJA; and implied under section 33(1) and 217(1) of the Constitution.

7 4 1 Nigeria

The grounds for the original complaint apply to judicial recourse, since the proceeding is merely the last stage of the challenge. According to PPA section 54(1), a bidder may challenge any omission or breach of the Act or the applicable regulatory frameworks by a procuring or

[47] Quinot *PPLR* (2011) 201.

[48] *DDP Valuers (Pty) Ltd* v *Madibeng Local Municipality* [2015] ZASCA 146 paras 23-25; *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality* [2014] ZAECGHC 55, [2014] 3 All SA 560 para 75; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company (Pty) Ltd* 2014 (3) BCLR 265 (CC) para 116. See, I Currie & J Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) 182.

[49] *Koyabe v Minister for Home Affairs* 2009 (2) BCLR 1192 (CC) paras 46-49; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Company (Pty) Ltd* 2014 (3) BCLR 265 (CC) paras 115-127; *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality* [2014] ZAECGHC 55, [2014] 3 All SA 560 para 75.

disposing entity. The following are breaches and constitute grounds of review (an example of each is presented).

- Lack of authority- an accounting officer awarding contracts in excess of prescribed threshold, contrary to PPA section 22.[50]
- Bias- a procurement decision-maker having a direct or indirect interest in a bidder, contrary to PPA section 57(9)-(12).
- Error of law- a procuring entity misapplying the award criteria, contrary to PPA sections 16(17), 24(3) and 60.[51]
- Noncompliance with a mandatory and material procedure- failure to evaluate bids before award, contrary to PPA section 32.
- Procedural unfairness- using evaluation criteria different from those in the solicitation documents, contrary to PPA section 32(1).
- Unreasonableness- using restricted procurement methods based on unacceptable grounds, contrary to PPA sections 40 and 42.
- Failure to take a decision- failure of BPP to give review decision within the deadline.[52]

7 4 2 South Africa

Applicable review grounds are listed in section 6 of PAJA, which subsumes those in sections 33 and 217 of the Constitution. These grounds are presented below, with examples.

- Lack of authority and unlawful delegation-[53] an accounting officer awarding contract through a non-competitive process, without due approval.[54]
- Bias-[55] contracting authority awarding contract to a bidder who did not comply with bid specifications, while disqualifying some bidders on that ground.[56]

[50] See *Federal Republic of Nigeria v Olabode George* FHC(Abuja) 26-10-2008 suit no ID/71c/2008 (tried before the PPA).
[51] See *Cupero Nigeria Limited v Federal Ministry of Water Resources* FHC(Abuja) 12-6-2012 suit no FHC/Abj/CS/867/11.
[52] PPA s 54(7).
[53] Section 6(2)(a)(i) & (ii).
[54] *Minister of Transport NO v Prodiba (Pty) Ltd* [2015] ZASCA 38; [2015] 2 All SA 387 (SCA); National Treasury Instruction Note on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management of 11-05-2011 paras 3 9 3-3 9 4.
[55] Section 6(2)(a)(iii).
[56] *Esorfranki Pipelines v Mopani District Municipality* [2014] ZASCA 21; [2014] 2 All SA 493 (SCA).

- Failure to comply with mandatory and material procedure-[57] bidders not given prior notification of a special scoring used during bid evaluation.[58]
- Procedural unfairness-[59] refusing an application to reconsider decision and awarding contract without observing a mandatory appeal period.[60]
- Error of law-[61] exercising the power to debar a contractor without fulfilling a requirement of law.[62]
- Action taken for wrong reasons or considerations-[63] contract not awarded to the lowest responsive bidder because it was previously awarded some on-going contracts.[64]
- Irrationality and unreasonableness-[65] awarding contract without competitive bidding unsupported by cogent reason.[66]
- Unconstitutionality or unlawfulness-[67] vague and contradictory evaluation criteria (contrary to principle of transparency under section 217 of the Constitution).[68]
- Failure to take a decision-[69] refusal to review an award decision following bidders' application for reconsideration.[70]

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[57] Section 6(2)(b).

[58] *Stiegelmeyer Africa (Pty) Ltd v National Treasury of South Africa* [2015] ZAWCHC 9; [2015] 2 All SA 110 (WCC). See also *Total Computer Services (Pty) Limited v Municipal Manager Potchefstroom Local Municipality* [2007] ZAGPHC 239; 2008 (4) SA 346 (T); *CEO of South African Social Security Agency NO v Cash Paymaster Services (Pty) Ltd* [2011] ZASCA 13; 2012 (1) SA 216 (SCA) para 28.

[59] Section 6(2)(c).

[60] *Total Computer Services (Pty) Limited v Municipal Manager Potchefstroom Local Municipality* [2007] ZAGPHC 239; 2008 (4) SA 346 (T); *Chairman, State Tender Board v Supersonic Tours (Pty) Ltd* [2008] ZASCA 56.

[61] Section 6(2)(d).

[62] *Chairman, State Tender Board v Supersonic Tours (Pty) Ltd* [2008] ZASCA 56, 2008 (6) SA 220 (SCA); *Sanyathi Civil Engineering & Construction (Pty) Ltd v eThekwini Municipality, Group Five Construction (Pty) Ltd v eThekwini Municipality* [2011] ZAKZPHC 45; [2012] 1 All SA 200 (KZP).

[63] Section 6(2)(e)(i)-(vi).

[64] *RHI Joint Venture v Minister of Roads and Public Works, Eastern Cape* [2003] ZAECHC 23; *Eskom Holdings Limited v New Reclamation Group (Pty) Ltd* [2009] ZASCA 8; 2009 (4) SA 628 (SCA).

[65] Section 6(2)(f)(ii)&(h).

[66] See *TEB Properties CC v The MEC, Department of Health and Social Development, North West* [2011] ZASCA 243; [2012] 1 All SA 479 (SCA).

[67] Section 6(2)(f)(i) and (i).

[68] *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* [2013] ZAWCHC 3; *TEB Properties CC v The MEC, Department of Health and Social Development, North West* [2011] ZASCA 243; *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) para17-18; *Chairperson, Standing Tender Committee v JFE Sapela Electronics* 2008 (2) SA 638 (SCA) para 14; *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA) para 9.

[69] Section 6(2)(g), (3).

[70] *Actaris South Africa (Pty) Ltd v Sol Platjie Municipality* [2008] ZANCHC 6; [2008] 4 All SA 168 (NC).

In addition to the aforementioned grounds, public procurement decisions may also be challenged for noncompliance with the overreaching constitutional requirement of legality.[71] For example, judicial review may be pursued on the grounds of unlawfully discriminatory effect of a procurement decision.

The above grounds vest considerable potency on judicial review of procurement decisions. For instance, the standard of review for reasonableness is high. In many cases it entails an intensive scrutiny of administrative decisions, ranging from threshold rationality review to proportionality or a standard quite close to it.[72] However, it does not generally entail the court substituting the decision with its own opinion.[73]

7 4 3 Analysis

The grounds of review under the South African judicial recourse differ from its Nigerian counterpart in certain respects. First, for South Africa, the grounds of review are generally listed by the PAJA; and are thus easy to identify and apply. Conversely, for Nigeria, the review grounds are gleaned from section 54(1) of PPA.

Secondly, more grounds of review are provided under the South African judicial recourse than its Nigerian counterpart. For example, "action taken for wrong reason or consideration"[74] and "unconstitutionality", are grounds under the South African system, which do not exist under the Nigerian PPA. Unconstitutionality constitutes a ground because the South African Constitution enshrines certain fundamental public procurement principles;[75] while the Nigerian Constitution does not. Unconstitutionally enjoys an important status, as a procurement decision made in accordance with any legislation, which however contravenes a constitutional procurement principle,[76] would be invalid on the grounds of unconstitutionality.[77]

Thirdly, existence of more review grounds in South Africa creates more opportunity for review of public procurement decisions than is obtainable in Nigeria. For example, a party

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[71] *City of Cape Town v SANRAL* [2015] ZAWCHC 135; 2016 (1) 2015 (6) SA 535 (WCC) para 11.
[72] Quinot (2011) *PPLR* 201. See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 45; *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 108.
[73] *Carephone (Pty) Ltd v Marcus NO* 1999 (3) SA 304 (LAC) para 36; *Bato Star Fishing v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 45.
[74] However, this is arguably similar to "unreasonableness".
[75] Section 217.
[76] Such as preferential procurement under SA Constitution s 217(2).
[77] See SA Constitution s 2.

may bring a case, on grounds of unconstitutionality, to enforce the preferential/affirmative procurement principles enshrined in the South African Constitution;[78] while such would not arise in Nigeria.

7 5 Parties to suit

This section identifies the persons that can sue and be sued in procurement litigation in both jurisdictions. This is critical, as it is only when the right parties are before a court that it can resolve the dispute validly.[79] Also, it is these parties that will be bound by the outcome of the suit. The element of an effective bidder remedies system relevant under this subheading is: bidders have a general right to challenge an act or decision of a procuring entity.

7 5 1 Nigeria

Generally, it is only parties to an initial administrative review and the review forum (the BPP) that would be proper parties in the subsequent judicial recourse.[80] This is because judicial recourse is only by way of appeal from BPP's review. Although section 54(7) mentions that "the bidder may appeal", it is reasonably assumed that standing is not limited to bidders, for three reasons. First, "the bidder" is mentioned because bidders are the focal parties of the review right under section 54. Secondly, right of appeal inherently extends to all parties to a proceeding that is subject to appeal.[81] Thirdly, section 54(7) does not state that "only bidders" may appeal.[82] The court in *Cupero Nigeria Limited v Federal Ministry of Water Resources*[83] held that even if section 54(7) does not entitle all parties in the administrative review to judicial recourse, that they would exercise such right pursuant to section 6(6)(b) of the Constitution.[84]

Thus, a plaintiff/applicant in a procurement judicial recourse may be any of the following.

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[78] See *Manong Associates (Pty) Ltd v Eastern Cape Department of Road and Transport* [2008] ZAEQC 2; 2008 (6) SA 434 (EqC); *RHI Joint Venture v Minister of Roads and Public Works, Eastern Cape* (769/02) [2003] ZAECHC 35 paras 27-33, 36-42; *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality* 2011 (4) SA 406 (KZP), [2010] ZAKZPHC 23.

[79] E Ojukwu & C Ojukwu *Introduction to Civil Procedure* 2nd ed (2004) 71.

[80] However, a person who is affected by a review decision but was not a party may, with leave of court, appeal against the decision- *Re: Madaki* (1996) 7 NWLR (Pt 459) 143; *Ifebuzor v Nwabeze* (1998) 8 NWLR (Pt 560) 148.

[81] See *Akinbiyi v Adelabu* (1956) SCNLR 109; *Nabaruma v Offodile* (2004) 13 NWLR (Pt 891) 599; *Emeakayi v COP* (2004) 4 NWLR (Pt 862) 158.

[82] *Expressio unius est exclusio alterius* would not apply.

[83] FHC(Abuja) 12-6-2012 suit no FHC/Abj/CS/867/11 66-67.

[84] Provides matters to which judicial powers extend.

(a) An unsuccessful bidder- (i) who was not satisfied with the outcome of its review application to the procuring entity and the BPP;[85] (ii) who obtained a remedy from the BPP, which the procuring entity failed to implement;[86]

(b) A successful bidder, whose award was varied, suspended or nullified on review;

(c) The procurement entity, which BPP's review decision is adverse to; for example, its award is cancelled.

Since bidders have a right to challenge, Nigerian procurement judicial recourse is effective in this regard.

Civil society organisations (CSOs), as procurement observers,[87] do not have right to judicial recourse under section 54 of PPA.[88] Nevertheless, CSOs, relying on section 6(6)(b) of the Constitution,[89] can sue procuring entities for decisions such as: preventing them from observing procurement proceedings or denying them access to procurement information.[90]

The respondents in a procurement judicial recourse may be:

(a) The BPP;

(b) The procuring entity; and

(c) The bidder that BPP's decision favoured.

It is critical to make the BPP a respondent, since it is the administrative review body whose decision is in issue; so that it can be directly bound by the order of court which may reverse its decision. Apart from the above respondents, any other unsuccessful bidder that participated in the review proceedings may be joined.[91] However, it may be unnecessary and unwieldy to join uninterested unsuccessful bidders.

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[85] PPA s 54(7).

[86] See *Cupero Nigeria Limited v Federal Ministry of Water Resources* FHC(Abuja) 12-6-2012 suit no FHC/Abj/CS/867/11.

[87] PPA s 19(b).

[88] KT Udeh "Social Accountability Mechanisms and Public Procurement Reform in Nigeria" in S N Nyeck *Public Procurement Reform and Governance in Africa* 235 243.

[89] Empowers courts to determine any question as to the civil rights and obligations of persons and authorities.

[90] Pursuant to PPA s 19(b) and the FOIA. See *PPDC v National Agency for Food and Drug Administration and Control* FHC(Abuja) 15-12-2014 suit no FHC/ABJ/CS/760/13; *PPDC v Power Holding Company of Nigeria (PHCN) PLC* FHC(Abuja) 1-3-2013 suit no FHC/ABJ/CS/582/2012; *PPDC v The Hon. Minister of the FCT* HCFCT 30-1-2014 suit no FCT/HC/CV/M/3057/13: available at <procurementmonitor.org/ppdc/what-the-court-says/> (accessed 12-2-2017).

[91] See PPA s 54(5).

It is usual but wrong to make the Attorney General of the Federation (AGF) a defendant, merely on the ground of being the Chief Law Officer of the Federation.[92] First, it is generally not the Federal Government as an entity that is sued, but ministries and agencies that can sue and be sued.[93] Secondly, the originating process usually does not contain any allegation and claim against the AGF to attach him with any question to answer. As a result, the AGF is usually struck out, for misjoinder.

7 5 2 South Africa

All persons mentioned under section 38 of the Constitution (on right to enforce the Bill of Rights) may apply for the judicial review of public procurement decisions; as public procurement is an administrative action,[94] that must be just according to the Bill of Rights.[95] These persons include, anyone:

(a) acting in their own interest;

(b) acting on behalf of another person who cannot act in their own name;

(c) acting as a member of, or in the interest of, a group or class of persons;

(d) acting in the public interest; and

(e) an association acting in the interest of its members.

However, it is usually unsuccessful (or potential)[96] bidders that are applicants for procurement judicial review. Successful bidders whose awards were administratively reviewed and cancelled also feature as applicants.[97] But unlike in Nigeria, parties to procurement judicial review would in most cases not come from an initial administrative review proceeding, owing to lack of effective internal remedy options in those cases.[98]

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[92] See *Obyke Systems Consult Limited v Nigerian College of Aviation Technology* Suit no: FHC/ABJ/CS/533/2008 (Abuja) 15 Nov 2011; *A.C Egbe Nig Limited v DG BPP* FHC(Benin) 21-07-2010 suit no FHC/B/CS/116/2010; in *Cupero Nigeria Limited v Federal Ministry of Water Resources* FHC(Abuja) 12-6-2012 suit no FHC/Abj/CS/867/11.

[93] *Attorney General Kano State v Attorney General of the Federation* [2007] 4 NWLR (pt 1029) 164.

[94] Quinot (2011) *PPLR* 192, 195; Quinot *State Commercial Activity* 162. See also *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* 1997 2 All SA 548 (SCA); *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA); *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province* [2007] ZASCA 165; 2008 (2) SA 481 (SCA) para 4.

[95] See Constitution ss 33, 34; also, PAJA ss 1(1) & 6(1).

[96] See *MEC for Education, Northern Cape v Bateleur Books (Pty) Ltd* [2009] ZASCA 33; 2009 (4) SA 639 (SCA); [2009] 3 All SA 127 (SCA).

[97] *TEB Properties CC v The MEC, Department of Health and Social Development, North West* [2011] ZASCA 243; *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA).

[98] See 5 1 above.

Since bidders have a general right to review procurement judicial recourse in South Africa is effective in this regard.

Furthermore, contracting authorities may apply for judicial review and the setting aside of their own irregular award decisions.[99] This may be necessitated by three factors. First, they are duty bound not to submit to or enforce an unlawful contract.[100] Secondly, an award establishes a valid contract between the contracting authority and the winning bidder until it is set aside by a court.[101] Thirdly ensures certainty of the validity of a contract, where there have been ostensible failures in the procurement process.[102]

The usual respondents in a procurement judicial review, where the unsuccessful bidder sues, are the contracting authority and the winning bidder. It may be unnecessary to join other unsuccessful, but uninterested, bidders. Where there was an initial internal review, the review authority could also be joined. And, a judicial review application by a contracting authority would necessarily be against the winning bidder.

7 6 Forum

7 6 1 Nigeria

Section 54(7) of PPA vests jurisdiction on the Federal High Court (FHC) to review federal government procurement, after BPP's review. This aligns with section 251(1)(r) and (p) of the Constitution,[103] which confers exclusive original jurisdiction on the FHC for "any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies"; and for civil matters involving "the administration or the management and control of the Federal Government or any of its agencies".

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[99] See Quinot (2011) PPLR 202; *Buffalo City Metropolitan Municipality v Asla Construction (Pty)* [2016] ZAECGHC 55 para 5; *Municipal Manager: Qaukeni Local Municipality v FV General Trading* [2009] 4 All SA 231 (SCA) para 23; *TBP Building & Civils v the East London Industrial Development Zone* [2009] JDR 0203 (ECG); *Casalinga Investments CC t/a Waste Rite v Buffalo City Municipality* [2009] JDR 0299 (EL); *Zimport Water Service CC v Minister of Public Works*[2008] ZAGPHC 82 para 60-61; *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 36.

[100] *Municipal Manager: Qaukeni Local Municipality v FV General Trading* [2009] 4 All SA 231 (SCA) para 23; *Premier, Free State v Firechem Free State* 2000 (4) SA 413 (SCA) para 36; *Casalinga Investments CC t/a Waste Rite v Buffalo City Municipality* [2009] JDR 0299 (EL).

[101] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 26; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006(3) SA 151 (SCA) 24; *Zimport Water Service CC v Minister of Public Works* [2008] ZAGPHC 82 paras 39 & 98. See Quinot (2011) PPLR 202; Quinot *TSAR* 444-446.

[102] Quinot (2011) PPLR 202.

[103] And s 7(1)(r) & (p) Federal High Court Act 1973 (as amended) CAP F12 LFN 2004 ("FHC Act").

The FHC is a High Court of Justice established by the Constitution[104] and the Federal High Court Act 1973,[105] as a federal superior court of record.[106] Its civil proceedings are generally governed by the Federal High (Civil Procedure) Rules 2009 ("FHC Rules"). The Court exercises jurisdiction throughout the Federation, and sits in various Judicial Divisions across the Federation.[107] Generally, it is constituted by one judge of the court.[108]

Since there is nothing in the PPA to the contrary, procurement review decision of the FHC may be appealed at the Court of Appeal, up to the Supreme Court.[109]

The procedures and powers of the FHC are discussed below.[110]

7 6 2 South Africa

The High Court of South Africa is generally the court of first instance over public procurement disputes, by virtue of section 169(1) of the Constitution. The section vests the High Court with original jurisdiction over any constitutional matter,[111] and any other matter not assigned to another court by an Act of Parliament. Public procurement is a constitutional matter, as it is enshrined under section 217 of the Constitution.[112] Besides, section 7(4) of PAJA provides that until rules of procedure for judicial review made by the Rules Board for Courts of Law come into operation; proceedings for judicial review must be instituted in a High Court or (rarely) the Constitutional Court.

However, the Rules of Procedure for Judicial Review of Administrative Action (PAJA Rules)[113] while yet to come into force was reviewed and significant parts declared invalid in

[104] Section 249.
[105] Section 1.
[106] Constitution s 6(3) & (5)(c).
[107] FHC Act s 19.
[108] Constitution s 253; FHC Act s 23.
[109] See 3 3 3 1 above.
[110] 7 7-7 9.
[111] Except those the Constitutional Court has agreed to hear directly under section 167(6)(a); and, those assigned by an Act of Parliament to another court of a status similar to the High Court.
[112] See also s 167(7).
[113] GN R966 in GG 32622 of 09-10-2009, made in terms of PAJA s 7(3).

Lawyers for Human Rights v Rules Board for Courts of Law.[114] This led to the Rule being abandoned. Thus, Rule 53 of the Uniform Rules of Court still governs judicial review.[115]

The High Court is a superior court[116] established by section 166(c) of the South African Constitution. It currently consists of nine judicial Divisions; each sitting and exercising jurisdiction in one or more places as prescribed by law or the Minister.[117] When exercising its original jurisdiction, it is generally constituted by a single judge; and in certain cases by not more than three judges, referred to as "full court".[118] The full court may sit over appeals against procurement disputes decided by its single judge.[119] Appeal against procurement review by a full court lies to the Supreme Court of Appeal, and may afterwards proceed to the Constitutional Court.[120] This is similar to what obtains in Nigeria, as seen above.

Relevant procedures and powers of the High Court are discussed below.[121]

7 7 The proceedings

The issues examined here include: timeframes for commencing judicial recourse; implications of applying out of time; permissibility of extension of time; modes of commencement and duration of proceedings. Also examined is whether an administrative review application rejected for being out of time, could proceed to judicial review?

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[114] [2012] ZAGPPHC 54, [2012] 3 All SA 153 (GNP), 2012 (7) BCLR 754 (GNP). See SERAJ "PAJA Rules Found Unconstitutional" (01-04-2012) *SERAJ Stellenbosch University* <http://blogs.sun.ac.za/seraj/2012/04/01/paja-rules-found-unconstitutional/> (accessed 06-11-2017); G Quinot "New Procedures for Judicial Review of Administrative Action" (2010) 25 *SA Public Law* 646.

[115] Cases after *Lawyers for Human Rights* indicate that Rule 53 continues to apply. See for example: City of *Cape Town v SANRAL* [2015] ZAWCHC 135, 2016 (1) BCLR 49 (WCC), [2016] 1 All SA 99 (WCC), 2015 (6) SA 535 (WCC) para 121; *Airports Company South Africa Limited v Airport Bookshops (Pty) Ltd t/a Exclusive Books* [2015] ZAGPJHC 154, 2016 (1) SA 473 (GJ), [2015] 3 All SA 561 (GJ) para 92; *Tshiyombo v Members of the Refugee Appeal Board* [2015] ZAWCHC 170, [2016] 2 All SA 278 (WCC) para 2.

[116] Superior Courts Act 10 of 2013, ss 1 and 6(1).

[117] Section 6(1) & (3)(b)&(c).

[118] Section 14(1)(a) & (b).

[119] See *City of Cape Town v Reader* (719/2007) [2008] ZASCA 130 paras 1-3; *Kungwini Local Municipality v Sekwanele Security Services* (A354/08) [2009] ZAGPPHC 184; *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality* [2014] ZAECGHC 55; [2014] 3 All SA 560 (ECG).

[120] See 3 3 3 1 above.

[121] 7 7-7 9.

7 7 1 Nigeria

7 7 1 1 Commencement

According to the PPA, section 54(7), Judicial recourse must be commenced within 30 days after: the receipt of BPP's review decision; or, the expiration of 21 working days stipulated for the BPP to deliver its decision. Receipt of BPP's decision is necessary for time to start running under the first instance, as the BPP usually communicates its review decisions through letters.[122]

Judicial recourse commenced out of time is incompetent;[123] and the PPA does not permit extension of the time. The contrary is the case in South Africa, as would be seen below.[124] Arguably, where the BPP had rejected a complaint filed out of time; the court would not assume jurisdiction to hear the matter, even if commenced within 30 days of receiving BPP's *decision*. This is because administrative review is condition precedent for judicial recourse.

The aforementioned commencement time supersedes the three months stipulated for commencing judicial review by order 34 rule 4 of the FHC Rules. Also, the court's power to extend time, under order 48 rule 4, does not apply to proceedings pursuant to section 54(7) of PPA. Furthermore, the three months limitation period under section 2(a) of the Public Officer Protection Act 1916,[125] does not apply, as the time under the PPA is shorter. Likewise, section14(1) of the PPA, requiring litigants to serve a 30-day pre-action notice to BPP does not apply to section 57(7) proceedings, as argued in 7 3 1 above.

7 7 1 2 Proceedings and duration

Similar to the UNICTRAL Model Law, the PPA provides for judicial recourse but does not stipulate its procedures. Hence, the court relies on the FHC Rules. The Rules do not provide a special procedure for procurement disputes; thus, the court adopts such procedure as it deems fit to do substantial justice between the parties.[126] Since procurement judicial recourse is regarded as largely a form of judicial review,[127] procedure for judicial review may be adopted.

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[122] PPA 54(6); BPP *SOP: Administrative Review* para 25.

[123] *Integrated Remediations Limited v Federal Ministry of Environment* FHC(Abuja) 14-11-2012 suit no FHC/Abj/CS/841/2010 41-42.

[124] 7 7 2 1.

[125] Chapter P 41 LFN 2004.

[126] FHC Act s 9(2).

[127] *Ofscon Nig Ltd v Ministry of Niger Delta Affairs* FHC(Abuja) 21-3-2012 suit no FHC/Abj/CS/315/2011 41.

Under order the FHC Rules, order 34 rules 3 and 5, judicial review is commenced by motion or originating summons; after applicant has first obtained the leave of court.[128] However, these modes are proper for cases involving only interpretation of law and documents.[129] Judicial recourse involving disputed facts must commence by writ of summons.[130] Here, leave of court required for judicial review would not apply, as suits by writ of summons are not regarded as an application by judicial review.[131]

Suits by writ of summons involve exchanging pleadings with supporting documents and calling witnesses.[132] Originating summons and motion involves reliance only on affidavit and copies of exhibits by parties.[133] Proceeding in the former is elaborate but more sustainable. While proceeding in the latter is faster, but could be precarious. For example, where a suit by originating summons involves substantial disputed facts, the applicant must request the court to convert the suit to one by writ of summons and order parties to file pleadings and call witnesses.[134] If the applicant/plaintiff fails to do so, the court may strike out the case for wrong commencement.[135] However, where the court thinks that disputed facts in parties' affidavit may be resolved only by cross-examining the deponents or relevant witnesses, the court may order such on its own initiative.[136] The FHC has expressed preference for commencing judicial recourse by writ of summons.[137]

Just as in administrative review proceedings, parties to judicial recourse (particularly bidders) have right of prompt access to related procurement records for evidence to support their cases, by virtue of Freedom of Information Act 2011 and PPA section 38(2)(b).

There is no stipulated duration for judicial recourse proceeding. However, section 36(1) of the Constitution indicates that judicial proceeding should be within a reasonable time.

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[128] FHC Rules o 34 r 3(1).
[129] FHC Rules o 3 r 6.
[130] See *Doherty v Doherty* (1968) NMLR 241; *NBN v Ayodele Alakija* (1978) 9 & 10 SC 59; *Pam v Mohammed* (2008) 16 NWLR (pt 1112) 1.
[131] FHC Rules o 34 r 9(5).
[132] FHC Rules o 3 r 3, o 13.
[133] O 3 r 9(2); o 13 r 35(15).
[134] FHC Rules o 3 r 8; o 34 r 9(5). See *Anatogu v Anatogu* (1997) 9 NWLR (pt 519) 49; *Famfa Oil Ltd v A G Federation* (2003) 18 NWLR (pt 852) 453; *Adebayo v Johnson* (1969) 1 All NLR 176 191.
[135] See *N A Williams v Hope Rising Voluntary Funds Society* (1982) 1-2 SC 145; *Revici v Prentice Hall Incorporated* (1969) 1 All ER 772 774.
[136] See *Falobi v Falobi* (1976) 9-10 SC 1; *Eboh v Oki* (1974) 1 SC.179 189-190; *Olu-Ibukun v Olu-Ibukun* (1974) 2 SC 41 48; *Akinsete v Akindutere* (1966) 1 All NLR 147 148.
[137] *Ofscon Nig Ltd v Ministry of Niger Delta Affairs* FHC(Abuja) 21-3-2012 suit no FHC/Abj/CS/315/2011 43-46.

Duration of proceeding depends on the general court system, the complexity of the case, and counsel. Procurement cases take up to a year or more. This is not indicative of the ability to proceed swiftly within a reasonably short period of time, within days or weeks. Yet, it does not necessarily eliminate the possibility of intervention without delay, as the court can grant interim reliefs.[138] Nevertheless, it is argued in 7 11 below that stipulating duration of procurement judicial recourse is doable and preferable.

7 7 2 South Africa

7 7 2 1 Commencement

Procurement judicial review, according to PAJA section 7(1), must be instituted without unreasonable delay and not later than 180 days:

(i) after any applicable internal remedies proceedings have been concluded; or

(ii) where no such remedies exist, after the person concerned was informed of the administrative action, became aware of the action and the reasons for it or should reasonably have become aware of the action and the reasons.

In (ii) above, time begins to run when the applicant became or should have become aware of the award decision; not when he became *aware of the irregularity* of the decision.[139] This aligns with the public interest in the finality of administrative decisions and the exercise of administrative functions.

Section 9 of PAJA permits extension of the above timeframe for a fixed period, by agreement of the parties,[140] or by the court on application by the party concerned, where the interests of justice so require (referred to as "condonation"). The Court has discretion to grant condonation, upon a holistic consideration of all relevant facts,[141] including: the degree of lateness, the explanation given, prospects of success, importance of the case; and the respondent's interest.[142]

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[138] See 7 9 1 below.

[139] *Aurecon South Africa (Pty) Ltd v City of Cape* [2015] ZASCA 209, [2016] 1 All SA 313 (SCA), 2016 (2) SA 199 (SCA) para 16.

[140] The court in *City of Cape Town v SANRAL* [2015] ZAWCHC 135, 2015 (6) SA 535 (WCC) para 15 fn 16, opined that the court may reject an agreement between the parties to extend the time, in appropriate circumstances, especially where third parties might be prejudicially affected.

[141] Condonation application must be supported by an affidavit- *Actaris South Africa (Pty) Ltd v Chairman of the Tender Committee* [2007] ZAFSHC 136 para 43.

[142] *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (AD) 532 B-E; *Actaris South Africa (Pty) Ltd v Chairman of the Tender Committee* [2007] ZAFSHC 136 paras 43-45; *City of Cape Town v SANRAL* [2015] ZAWCHC 135

It is arguable that an application for internal remedies rejected for being out of time, may successfully proceed to judicial review; provided the commences within the 180 days' timeframe or condonation is granted. This is based on PAJA, section 7(2)(c), that allows litigants to apply to be exempted from exhausting internal remedy.

Outside the stipulated timeframe, a procurement decision, even though wrongful, would become unreviewable.[143] This is because there is a public interest in the certainty and finality of administrative decisions.[144]

7 7 2 2 Proceedings and duration

According to Rule 53(1) of the Uniform Rules of Court, an application for judicial review of a (public procurement) decision shall be commenced by notice of motion; inviting the decision-maker to show cause why such decision should not be reviewed and corrected or set aside. After receipt of the notice of motion, the decision-maker shall within fifteen days despatch to the court registrar the record of the challenged proceedings, together with such reasons as he is by law required or desires to give.[145] He also notifies the applicant whether he shall oppose the review application.[146] The registrar immediately makes the record available to the parties.[147] Besides, the parties have a right of access to relevant public records and reason for administrative decision, under PAIA and PAJA, as discussed above.[148]

The court determines the review based on the affidavits and documents filed by parties.[149] This ordinarily makes the proceeding straightforward and saves time. Nevertheless,

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paras 22 & 32; *Zwane v Magistrate Maphumulo* 1980 (3) SA 976 (N); *Khumalo v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) para 52.

[143] See *City of Cape Town v SANRAL* [2015] ZAWCHC 135 paras 13 & 15; *Chairman STC v JFE Sapela Electronics (pty) Ltd* [2005] 4 All SA 487 (SCA) para 28*; Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 27 242E-F; *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) 41E-42C; *Gqwetha v Transkei Development Corporation Ltd* 2006 (2) SA 603 (SCA) paras 22-23; *Opposition to Urban Tolling Alliance v The South African National Roads Agency Ltd* [2013] 4 All SA 639 (SCA) para 25.

[144] *City of Cape Town v SANRAL* [2015] ZAWCHC 135 para 13.

[145] See *Cash Paymasters Services (Pty) Ltd v Eastern Cape Province* 1999(1) SA 324 (CK CH) 353G; *Actaris South Africa (Pty) Ltd v Sol Platjie Municipality* [2008] 4 All SA 168 para 25; *Lawyers for Human Rights v Rules Board for Courts of Law* [2012] 3 All SA 153 (GNP) para 22.

[146] Rule 53(1)(b) & (5).

[147] Rule 53(3).

[148] 5 3 8 2 1(a).

[149] Rule 53(2), (4), (5)(b), (6) & (7); r 6(5)(g); *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234(C) 235 E-G; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26; *Indiza Airport Management (Pty) Ltd v Msunduzi Municipality* [2012] ZAKZPHC 74; [2013] 1 All SA 340 (KZP) para 2.

where an application cannot properly be decided on affidavit, the court may dismiss it.[150] Contrariwise, it may, based on a party's request,[151] order that oral evidence be heard on specified issues with a view to resolving dispute of fact; or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.[152] This is similar to what obtains under Nigerian judicial review.

There is no defined timeframe for concluding procurement judicial review. Duration of the proceedings depends on the general court system, the complexity of the case, and counsel. The average duration for an opposed procurement case is two and a half years;[153] and, it may still go on appeal. This is not indicative of the ability to proceed swiftly within a reasonably short period of time. However, an applicant is expected to "proceed seriously and prosecute his case with reasonable swiftness within reasonable time".[154] Also, courts can award costs against a party that unduly prolongs proceedings.[155] The Supreme Court of Appeal in *Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province*[156] had exhorted the High Court to give priority to procurement review cases. The review timeframe does not necessarily erode the *possibility of intervention without delay*, as the court can promptly grant interim reliefs.

7 8 Interim Relief

Interim relief refers to short-term discretionary remedies that a party may request a court to grant before a full trial. It could also be obtained pending conclusion of administrative review.[157] Interim relief is available in Nigeria and South Africa. It relates to the power to implement other interim measures, such as giving restraining orders. It is resorted to because courts in both jurisdictions consider and grant it expeditiously (within a few days or weeks).[158]

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[150] Rules 53(7) & 6(5)(g).

[151] See *City of Cape Town v SANRAL* [2015] ZAWCHC 135 para 188; *H R Computek (Pty) Ltd v State Information Technology Agency (Pty) Ltd* (54646/2010) [2014] ZAGPPHC 386 paras 2-3.

[152] Rule 6(5)(g).

[153] See De Rebus "Court-Annexed Mediation Officially Launched" 11 [2015] 57 *DEREBUS* 2; M Ngoepe "Mediation Rules to ease the burden on Country's Court Roll" in DoJ & CD *Justice Today* (2015) 4.

[154] *Actaris South Africa (Pty) Ltd v Chairman of the Tender Committee of Third Respondent* [2007] ZAFSHC 136 para 21; *Mkhwanazi v Minister of Agriculture and Forestry, Kwazulu* 1990 (4) SA 763 (D).

[155] Rule 39(24).

[156] [2007] ZASCA 165, [2007] SCA 165 (RSA), [2008] 2 All SA 145, 2008 (2) SA 481; 2008 (5) BCLR 508 para 34.

[157] For South Africa, see 5 3 8 2 1 above; also, *City of Cape Town v SANRAL* [2015] ZAWCHC 135 para 119; *Darson Construction (Pty) Ltd v City of Cape Town* 2007 (4) SA 488 (C) 506F-H.

[158] This satisfies the element of *possibility of intervention without delay.*

Interim orders preserve the current state of the challenged procurement pending the trial. This is usually to prevent the conclusion or continuing performance of the procurement contract. It could also be directed at stopping any aspect of the procurement process, including cancelling or re-advertising a tender.[159]

Although a concluded contract may be set aside during review/trial,[160] interim relief is still advantageous. First, it may be impractical to overturn a completed or nearly-completed contract even if the award was invalid.[161] Secondly, a court may refuse to set aside a defective but not fraudulently concluded contract, even if only barely performed, where balance of interests and convenience demand.[162] Thirdly, interim relief prevents loss of opportunity to win contract and profit. Besides, a person claiming damages must mitigate its loss. The court may refuse to award damages for such loss where an aggrieved bidder had failed to timeously apply for injunction/interdict to stop performance of invalid contract.[163]

The forms and effectiveness of interim relief available in both jurisdictions are discussed below.

7 8 1 Nigeria

Interim relief is generally in the form of an interim or interlocutory injunction to restrain further action in the challenged procurement for a definite time, or pending the final determination of the trial or review proceeding.[164] The application is by motion on notice. But an interim

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[159] Example: *Indiza Airport Management (Pty) Ltd v Msunduzi Municipality* [2012] ZAKZPHC 74; [2013] 1 All SA 340 (KZP) paras 11-13. Thus, it satisfies the element of effectiveness requiring the *prevention in normal circumstances, the entry into force of a procurement contract while the dispute remains outstanding*.

[160] See 5 2 4 above.

[161] *Chairperson - Standing Tender committee v JFE Sapela Electronics* [2005] 4 ALL SA 487 (SCA) paras 26-29; *Sebeza Kahle Trade v Emalahleni Local Municipal Council* [2003] 2 ALL SA 340 (T) 348. See *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) para 1265F-H; and, *John Holt Ltd v Holts African Workers Union* (1963) 1 All NLR 379, (1963) 2 SCNLR 383; *Governor Imo State v Anosike* (1987) 4 NWLR (Pt 66) 663; and, *Race Auto Supply Co Ltd v Akib* [2001] 1 NWLR (Pt 695) 463. See Quinot *PPLR* (2011) 198.

[162] See *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province* [2007] ZASCA 165, [2008] 2 All SA 145, 2008 (5) BCLR 508, 2008 (2) SA 481 (SCA) paras 22-32; *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* [2010] ZASCA 13, 2010 (4) SA 359 (SCA), [2010] 3 All SA 549 (SCA) paras 15-21.

[163] See, SA: *Darson Construction (Pty) Ltd v City of Cape Town* 2007 (4) SA 488 (C) 506F-H; *Olitzki Property Holdings v State Tender Board* [2001] ZASCA 51 para 39; *Eskom Holdings Limited v New Reclamation Group (Pty) Ltd* [2009] ZASCA 8, 2009 (4) SA 628 (SCA), 2009 (8) BCLR 813 (SCA), [2009] 2 All SA 513 (SCA) paras 12-13. Nigeria: *Linus Onwuka v RI Omogui* (1992) SCNJ 98 124; *Obasuyi v Business Ventures Ltd* [2000] 12 WRN 112 SC.

[164] FHC Rules o34 r3(6)(b).

injunction may be applied ex parte, on affidavit disclosing real or extraordinary urgency.[165] Interim injunction lasts for a definite short date or until the hearing of another related application or until a further order. While interlocutory injunction lasts till the end of the trial.[166] Interim injunction may be granted when the respondent has been served with the notice of motion but has not filed an answering affidavit; thus, it proceeds faster than interlocutory injunction.[167] However, it is only granted where evidence shows that any delay in hearing it would entail irreparable damage or serious mischief to the applicant. In addition, he must furnish the court with a satisfactory undertaking as to damages.[168] Evidence that the contract would be concluded may not suffice as irreparable damage, since concluded contract can be set aside. But that the contract is about being performed or completed could suffice.

Injunctive remedies are discretion. However, the applicant must show concurrently in his affidavit that:[169]

- he has a right or a serious question to be tried (with possibility of success);
- the balance of convenience is on his side;
- damages cannot be an adequate compensation, if the applicant succeeds at the trial.

The applicant satisfies the first requirement if he establishes that he was a bidder in the challenged procurement and identifies a breach of the procurement regulatory framework. Balance of convenience relates to weighing the interests of the parties and the public, based on the facts of each case. An applicant satisfies this if he shows that more justice will result in granting the application than in refusing it.[170] A delay in bringing the application indicates that

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[165] FHC Rules o 28 r 1(2); o 26 r2(1), 7 & 8(1). See *7-Up Bottling Company Ltd v Abiola and Sons Nigeria Ltd* [1995] 3 NWLR (Pt 457) 257; *Obeya Memorial Hospital v AG Federation* (1987) 3 NWLR (pt 60) 325; *Ojukwu v Governor of Lagos State* (1986) 3 NWLR (pt 26) 39*; Kotoye v CBN* (1989) 1 NWLR (PL98) 446.

[166] FHC Rules o26 r12; *Beese v Woodhouse* (1970) 1 ALL E.R. 769; (1970) I W.L.R. 586 590; *Woluchem v Wokoma* (1974) 1 All NLR (Pt 1) 605 607; *Kotoye v CBN* (1989) 1 NWLR (Pt 98) 446; *Attorney-General of the Federation v Fafunwa-Onikoyi* (2006) 18 NWLR (Pt 1010) 51; *AIC Ltd v NNPC* (2005) 5 SC (Pt 11) 60, (2005) 11 NWLR (Pt 937) 563.

[167] *Olowu v Building Stock Limited* [2004] 4 NWLR [Pt 864] 445.

[168] Order 26 r 7(2); *Globe Fishing Industries v Chief Folarin Coker* (1990) 7 NWLR (Pt 162) 265, 293-294; *Kotoye v CBN* (1989) 1 NWLR (Pt 98) 419 422-423 SC; *NIDB v Olaloni Ind Ltd* (1995) 9 NWLR (Pt. 419) 338 CA; *Obeya Memorial Hospital v AG Federation* (1987) 3 NWLR (Pt 60) 325 SC; *Olowu v Building Stock Limited* [2004] 4 NWLR [Pt 864] 445.

[169] *Egwuatu v Egwuatu* [1992] 4 NWLR (Pt 237) 594; *Kotoye v CBN* (1989) 1 NWLR (Pt 98) 446; *Obeya Memorial Hospital v AG Federation* (1987) 3 NWLR (pt 60) 340; *Missini v Balogun* (1968) 1 All NLR 318; *Ladunni v Kukoyi* (1972) 3 SC 31.

[170] *Kotoye v CBN* (1989) 1 NWLR (Pt 98) 446; *American Cyanamid Co v Ethicon Ltd* (1975) 1 All ER 504 510-511; *Ilechukwu v Iwugo* (1989) 2 NWLR (Pt 101) 99 106-107.

there is no urgency in the matter and defeats the basis for the prompt relief sought. Also, it may be refused if applicant has not taken steps to initiate the substantive suit or review.[171] Although damages is awardable at review or trial, a bidder could satisfy the third requirement by showing that damages would not adequately compensate for loss of opportunity for fair competition and of enhancing business profile and capacity.

7 8 2 South Africa

Interim relief here takes the form of an interim interdict to temporary restrain further action on the challenged procurement.[172] The order lasts till the final determination of the related review; except the court rescinds or varies it pursuant to a party's application.[173] Interim interdict application is brought on notice of motion supported by an affidavit.[174] An urgent application could also be brought; in which case the court, to hear it more expeditiously, dispenses with certain processes and service.[175]

Interim interdict is discretionary. The concurrent requirements for an interim interdict are as follows:[176]

- existence of a prima facie right, though open to some doubt;
- a well-grounded apprehension of irreparable harm if the relief is not granted;
- a balance of convenience in favour of granting it; and
- the absence of a suitable alternative remedy.

[171] O 28 r 1(2).
[172] See Quinot *PPLR* (2011) 198; PAJA s 8(1)(e); *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 5 SA 339 (SCA) 346H para 20; *Waenhuiskrans Arniston Ratepayers Association v Verreweide Eiendomsontwikkeling (Edms) Bpk* [2009] ZAWCHC 181; 2011 (3) SA 434 (WCC) paras 66 & 179.
[173] See *Esorfranki Pipelines v Mopani District Municipality* [2014] ZASCA 21, [2014] 2 All SA 493 (SCA) para 34; *Phillips v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) para 21; *Atkin v Botes* 2011 (6) SA 231 (SCA) para 12.
[174] Uniform Rule 6(1).
[175] Rule 6(12); *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality* [2008] 4 All SA 168 (NC) para 32(1).
[176] *City of Cape Town v SANRAL* (6165/2012) [2013] ZAWCHC 74 paras 62; *Easypay (Pty) Ltd v Mangaung Metropolitan Municipality* [2013] ZAFSHC 44 para 14; *Digital Horizons (Pty) Ltd v SA Broadcasting Corporation* (2008/19224) [2008] ZAGPHC 272 para 7; *TBP Building & Civils (Pty) Ltd v East London Industrial Development Zone (Pty) Ltd* [2009] JDR 0203 (ECG) para 30; *Matlafalang Training CC v MEC: Free State, Department of Public Works* [2008] ZAFSHC 136 para 7. See also *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) para 41; *Gool v Minister of Justice* 1955 (2) SA 682 (C) 688; *Webster v Mitchell* 1948 (1) SA 1186 (W); *Setlogelo v Setlogelo* 1914 AD 221.

The court assesses the parties' affidavit evidence holistically to determine whether the requirements have been satisfied; and, if they have, how to exercise its discretion.[177] The existence of a prima facie right, and the extent to which its certainty is open to doubt, are determined by considering the applicant's prospects of success in the pending review, relying on facts presented by the parties.[178] Balance of convenience entails the court weighing the interests of the parties and the public.[179] "[T]he more certain the prospects of success, the more inclined the court will be to grant the interim remedy; the less certain, the greater the weight that will be attached to the balance of convenience".[180] Evidence that obtaining an effective remedy will be thwarted if interim relief is not granted would satisfy the concept of irreparable harm.[181] Such evidence includes performance of the contract which may render set-aside impracticable. Where such evidence is established, it would be deemed that there is no suitable alternative remedy.[182]

South African courts are more inclined than not to grant interim interdict in public procurement cases, where a right or strong case for review is established, to preserve the viability of review remedies.[183]

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[177] *City of Cape Town v SANRAL* [2013] ZAWCHC 74 paras 62, 75 77. See Quinot (2011) *PPLR* 198-199; LTC Harms "Interdict" in WA Joubert (ed) *The Law of South Africa* 2 ed vol 11 (2008) 412–440.

[178] *City of Cape Town v SANRAL* [2013] ZAWCHC 74 para 77. See *Capstone 556 (Pty) Ltd v Commissioner, South African Revenue Services, Kluh Investments (Pty) Ltd v Commissioner, South African Revenue Services* 2011 (6) SA 65 (WCC) para 53; *Van der Westhuizen v Butler* 2009 (6) SA 174 (C) 182C-E; *Camps Bay Residents Ratepayers Association v Augoustides* 2009 (6) SA 190 (WCC) para 10; *Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd* 2001(3) SA 344 (N) 357C-E; *Ferreira v Levin NO, Vryenhoek v Powell NO* 1995 (2) SA 813 (W) 832I-833B.

[179] See *Digital Horizons (Pty) Ltd v SA Broadcasting Corporation* [2008] ZAGPHC 272 paras 7, 24–28; *TBP Building & Civils (Pty) Ltd v East London Industrial Development Zone (Pty) Ltd* [2009] JDR 0203 (ECG) para 34; Quinot (2011) *PPLR* 198.

[180] *City of Cape Town v SANRAL* [2013] ZAWCHC 74 para 77. See DE Van Loggerenberg (ed) *Erasmus, Superior Court Practice* [Service 39, 2012] E8-9.

[181] *City of Cape Town v SANRAL* [2013] ZAWCHC 74 para 78. The evidence is also relevant in determining the balance of convenience.

[182] *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA); *Matlafalang Training CC v MEC: Free State, Department of Public Works* [2008] ZAFSHC 136 para 21; *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality* [2008] 4 All SA 168 (NC) paras 29 & 31; *Eskom Holdings Ltd v The New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 11. See R Summers "When Certainty and Legality Collide: The Efficacy of Interdictory Relief for the Cessation of Building Works Pending Review Proceedings" 2010 13(5) *PER/PELJ* 166 182.

[183] See for example: *City of Cape Town v SANRAL* [2013] ZAWCHC 74 para 77; *Easypay (Pty) Ltd v Mangaung Metropolitan Municipality*[2013] ZAFSHC 44; *Esorfranki Pipelines v Mopani District Municipality* [2014] ZASCA 21, [2014] 2 All SA 493 (SCA) paras 5-6; *Cash Paymaster Services (Pty) Ltd v Chief Executive Officer of South African Social Security Agency NO* (53753/09) [2009] ZAGPPHC 169; *Matlafalang Training CC v MEC: Free State, Department of Public Works*[2008] ZAFSHC 136; and, *Actaris South Africa (Pty) Ltd v Sol Platjie Municipality* [2008] ZANCHC 6; [2008] 4 All SA 168 (NC). See also Quinot (2011) *PPLR* 200.

7 8 3 Analysis

As seen immediately above, the requirements and procedure for obtaining interim remedy in public procurement are essentially similar in both jurisdictions. However, interim relief is more imperative to South African public procurement. Nigeria's PPA, unlike the relevant South African legislation, stipulates automatic suspension of procurement proceedings during administrative review.[184] Thus, interim relief would only be necessary in Nigeria's federal procurement system during judicial recourse; but relevant during both administrative and judicial review in South Africa.

Injunctive or interdictory orders are peremptory and disobeying them attracts sanctions;[185] such as being charged for contempt of court, punishable by imprisonment or fine.[186] This corresponds with the power to impose financial sanctions for non-compliance with interim orders. It thus contributes to the effectiveness of the remedies system; which is further strengthened by the availability of final remedies.

7 9 Final remedies

Final remedies are the relief that the court may grant at the conclusion of the full trial or review. This section takes a look at the nature and effectiveness of these remedies. On effectiveness, what is assessed is: whether the forum has power to cancel (set aside) the procurement proceedings or to award damages if such intervention is no longer possible.

7 9 1 Nigeria

As seen above,[187] Nigerian procurement judicial recourse may be pursued by judicial review or writ of summons proceedings. Relevant remedies derivable from judicial review under the FHC Rules are primarily certiorari and mandamus;[188] and the primary relief from a

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[184] See 6 8 1 and 5 3 8 above.

[185] Nigeria: *Woluchem v Wokoma* (1974) 1 All NLR (Pt 1) 605 607; *Alexander Marine Mangi v Koda International Ltd* (1999) 1 NWLR (Pt 585) 40 48. SA: *S v Beyers* 1968 (3) SA 70 (A); *Gentech Engineering Plastic CC v Reddy* (2462/2008, 1422/2009) [2011] ZAECPEHC 31 paras 338-340; *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) paras 6 & 11.

[186] See *R v Almon* (1765) Wilm 243 254–257, 97 ER 99-100. Nigeria: *Atake v Attorney General of the Federation* (1982) 11 SC 153 177-179, (1983) 3 NCLR 66; *Abiegbe v Registered Trustees of the African Church* [1992] 5 NWLR (Pt. 241) 366; *Ebhodaghe v Okoye* [2005] 1 MJSC 156. SA: *S v Beyers* 1968 (3) SA 70 (A); *Burchell v Burchell* (ECJ 010/2006) [2005] ZAECHC 35 paras 8-13; *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; *Gentech Engineering Plastic CC v Reddy* (2462/2008, 1422/2009) [2011] ZAECPEHC 31 paras 340-342.

[187] 7 3 1 and 7 7 1.

[188] Order 34 r1. These remedies are discretionary.

procurement-related writ proceeding is a set aside order.[189] Other remedies, obtainable under both proceedings, are declaration, perpetual injunction and damages.[190]

7 9 1 1 Certiorari/set aside order

The court may issue a certiorari or grant an order to set aside the original procurement or the administrative review decisions found to be in breach of the law. The effect of both is to nullify the challenged decision. In *Cupero Nigeria Limited v Federal Ministry of Water Resources*[191] the administrative review decision of BPP was set aside, for violating a statutory requirement,[192] viz., notifying interested bidders to make representation during the review. The matter was remitted to the BPP for rehearing. Generally, a court may quash only a part of a challenged decision that is in breach, and sustain the part(s) that is valid.[193]

Nigerian legal authorities still limit the application of certiorari to the exercise of judicial or quasi-judicial powers by a public body.[194] The modern approach in some common law jurisdictions is to apply certiorari (quashing order) flexibly to administrative actions, including executive decisions.[195] As long as the restrictive application of certiorari prevails in Nigeria, the implication is that certiorari may only issue against an administrative review decision, not the original procurement decision. A set aside order through a writ proceeding applies to both the procurement and review decisions; and may be a preferable alternative.

7 9 1 2 Other remedies

Where the procuring entity has failed to act in accordance with the regulatory frameworks or the review decision of the BPP, court may grant a mandatory order/injunction or a mandamus

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[189] See *Cupero Nigeria Limited v Federal Ministry of Water Resources* FHC(Abuja) 12-6-2012 suit no FHC/Abj/CS/867/11.

[190] FHC o2 r2(1); 034 r7.

[191] FHC(Abuja) 12-6-2012 suit no FHC/Abj/CS/867/11.

[192] PPA s 54(5).

[193] Barnett *Constitutional and Administrative Law* 712.

[194] See *Amaka v Lt-Governor, Western Region* (1956) 1 FSC 57; *R v Ondo Divisional Council Ex parte Akinbote* (1960) 5 FSC 52; *Arzika v Governor, Northern Region* (1961) All NLR 379; *Nwaoboshi v Military Governor of Delta State* (1998) 10 NWLR (Pt 568) 131, (2003) 11 NWLR (Pt 831) 305; *Lagos State Judicial Service Commission v Kaffo* [2008] 17 NWLR [Pt 1117] 525; *Young v Judicial Service Commission* [2008] 9 NWLR (Pt 1091) 1. See also Nwadialo *Civil Procedure* 1055-1056.

[195] See, England: *Ridge v Baldwin* [1964] AC 40; *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864; *R v Gaming Board, ex p. Benaim* [1970] 2 QB 417; *R v London Borough of Hillingdon, ex p Royco Homes Ltd* [1974] 2 All ER 643; *R v Hull Prison Board of Visitors, ex parte St Germain* [1978] 2 All ER 198 20; Ireland: *Ingle v. O'Brien* (1974) 109 ILTR 7; *State (Healy) v Donoghue* [1976] I.R. 325 364.

to compel it to act accordingly.[196] For example, it would issue against a procuring entity that refused to reverse its award as determined by the BPP. A failure to comply with the order amounts to a contempt of court.[197]

The court can issue declarations on the legal position of the parties. For example, there may be "a declaration that the award of the contract by the procuring entity is wrongful, void and of no effect".[198] Although lacking coercive force, public bodies will respond to a declaration and comply with its terms by rectifying its actions.[199]

A perpetual injunction may be ordered to permanently restrain a procuring entity, the BPP or the successful bidder from acting unlawfully as it relates to the challenged procurement. For example, court may grant an order perpetually restraining the originally successful bidder from performing the contract, where the court has nullified the award. Failure to comply with an injunction is a contempt of court.[200]

There is no known Nigerian procurement case yet where the court substituted or varied an award decision of the procuring entity or the review decision of BPP. However, as the PPA provides them as remedies under administrative review, it is arguable that the legislature had intended that such powers may also be exercised by the court in appropriate circumstances.

7 9 1 3 Damages

There is no known procurement case where the court awarded damages. Thus, it is not established whether a bidder can recover damages for loss of profits, out-of-pocket expenses in preparing the tender, and the financial loss, arising from the award which is subsequently set aside by a court. Notwithstanding, relying on related authorities,[201] damages may be awarded where the procurement process is proven to be tainted with fraud, corruption, and bad faith; especially where the court may no longer intervene in the procurement.

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[196] See FHC Rules o34 r1; *Shitta-Bey v Federal Civil Service Commission* (1981) 1 SC 40; *Fawehinmi v Akilu* (1987) 4 NWLR 797; Nwadialo *Civil Procedure* 1053.

[197] Barnett *Constitutional and Administrative* Law 712-713; Nwadialo *Civil Procedure* 1034.

[198] See *Cupero Nigeria Limited v Federal Ministry of Water Resources* FHC(Abuja) 12-6-2012 suit no FHC/Abj/CS/867/11 2.

[199] Bernett *Constitutional and Administrative Law* 712-713.

[200] See *Cupero Nigeria Limited v Federal Ministry of Water Resources* FHC(Abuja) 12-6-2012 suit no FHC/Abj/CS/867/11 74-77.

[201] *Luxbridge Permanent Benefit Building Society v Pickard* [1939] 2 K.B. 248; *Cassell & Co Ltd v Broome* [1972] AC 1027; *Ughutevbe v Shonowo* [2004] 16 NWLR (Pt. 882) 300.

The possibility of awarding damages, although uncertain, adds to the effectiveness of the system.[202]

7 9 2 South Africa

7 9 2 1 Set aside order

The court "may grant any order that is just and equitable".[203] Where a public procurement decision is held to be reviewable or invalid, the court normally grants an order setting aside the decision or the contract.[204] However, a set aside is discretionary;[205] which entails the court weighing all interests which the order may affect;[206] and given consideration to "pragmatism and practicality".[207] Thus, the court will not invalidate public contracts for inconsequential irregularities.[208] Also, in exceptional circumstances, it may refuse to set aside an invalid award or contract. Examples include: where the impugned contract is completed or nearly-completed;[209] or where the order would cause disruptions and a host of problems to a new tender process and the work to be performed;[210] or where the review proceedings was not instituted within a reasonable time.[211]

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[202] To wit, *the power to award damages if intervention is no longer possible*.

[203] PAJA s 8(1); SA Constitution s 172(1)(b).

[204] PAJA s 8(1)(c). See Quinot (2011) *PPLR* 204; Quinot (2009) *TSAR* 443-446.

[205] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 SCA para 36 246D; *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA), [2005] 4 All SA 487 (SCA) para 28; *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* [2010] ZASCA 13, 2010 (4) SA 359 (SCA), [2010] 3 All SA 549 (SCA) para 15.

[206] *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) 23.

[207] *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) paras 27-29; *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* [2010] ZASCA 13, 2010 (4) SA 359 (SCA) para 15; *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* (40/13) [2014] ZASCA 21; [2014] 2 All SA 493 (SCA) para 20.

[208] *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO SASSA* 2013 (4) SA 557 (SCA) para 21; *South African National Road Agency Ltd v The Toll Collect Consortium* [2013] 4 All SA 393(SCA), 2013 (6) SA 356 (SCA) para 16.

[209] *Chairperson - Standing Tender committee v JFE Sapela Electronics* [2005] 4 ALL SA 487 (SCA) paras 26-29; *Sebeza Kahle Trade v Emalahleni Local Municipal Council* [2003] 2 ALL SA 340 (T) 348; *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) para 1265F-H.

[210] *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) para 27; *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* [2010] ZASCA 13, 2010 (4) SA 359 (SCA) para 15.

[211] See 7 7 2 1 above.

7 9 2 2 Other remedies

A set aside is usually accompanied with an order remitting the award decision for reconsideration by the contracting authority, with or without directions.[212] This is because the court is exercising review jurisdiction, not merit appeal. Thus, it generally will not substitute its decision for the invalidated award decision.[213] Rather, the court affords the authority another opportunity to exercise its administrative power lawfully. Nevertheless, in exceptional circumstances, the court may substitute or vary an award decision or correct a defect resulting from the decision or the failure to decide;[214] particularly, where it would result in time and money being saved or it would prevent another improper decision being taken.[215] Exceptional circumstances would include where:

- the court is in as good a position as the administrative authority to decide the issue;
- the administrative decision is a foregone conclusion (that is, only one proper outcome can emerge from the exercise of the administrator's discretion);
- the administrative authority should not be allowed to exercise its power.[216]

In the procurement context, a court would be in as good a position as the awarding authority where the relevant procurement processes (particularly bid evaluation and recommendation) had been duly completed by authorised persons, and the court has the benefit of the record of the processes that was relied upon by the awarding authority to make its decision.[217] Also, an awarding authority that is found to be grossly biased or incompetent

[212] PAJA s 8(1)(c)(i). See *Alexander Maintenance and Electrical Services CC v Nyandeni Local Municipality* [2012] ZAECMHC 10 paras 24 & 27; *City of Cape Town v SANRAL* [2015] ZAWCHC 135 para 277(d)&(e). However, in *CC Groenewald v M5 Developments* [2010] ZASCA 47 para 27, it was held that a court reviewing an appeal decision made in terms of Systems Act s 62(3) ought not to refer the matter back to the appeal authority, based on the restrictive provision of the section.

[213] See 7 3 above; also, *City of Cape Town v SANRAL* [2015] ZAWCHC 135 para 8; *RHI Joint Venture v Minister of Roads and Public Works, Eastern Cape* [2003] ZAECHC 23 para 43.

[214] PAJA s 8(1)(c)(ii)(aa). See *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape* 2007 6 SA 442 (CkHc) paras 42 & 48(2); *CFIT (Pty) Ltd v Minister of Defence* (22496/2013) [2015] ZAGPPHC 2 para 62.

[215] *RHI Joint Venture v Minister of Roads and Public Works, Eastern Cape* [2003] ZAECHC 23 para 43; *Johannesburg City Council v Administrator, Transvaal* 1969 (2) SA 72 (T) 76D-G; *Premier, Mpumalanga v Executive Committee, Association of State Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC).

[216] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22, 2015 (5) SA 245 (CC), 2015 (10) BCLR 1199 (CC) para 35-55; *Sanyathi Civil Engineering & Construction (Pty) Ltd v eThekwini Municipality, Group Five Construction (Pty) Ltd v eThekwini Municipality* (KZP) [2011] ZAKZPHC 45 para 24. See *Gauteng Gambling Board v Silver Star Development Ltd* 2005 (4) SA 67 SCA paras 28, 29. 39, 41.

[217] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22, 2015 (5) SA 245 (CC), 2015 (10) BCLR 1199 (CC) paras 57-58.

should not be afforded another opportunity to exercise its power.[218] An example of where the outcome of the administrative decision is a foregone conclusion is where the court finds that the applicant's bid was responsive, was evaluated as the highest points earner according to applicable criteria, and recommended for award at all levels of evaluation: thus, could not have been lawfully awarded to any other bidder. [219] The substitution order in this case would be to award the contact to the aggrieved bidder-applicant.[220]

However, according to the Constitutional Court in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited*,[221] "even where there are exceptional circumstances, a court must be satisfied that it would be just and equitable to grant an order of substitution", based on section 8(1) of PAJA[222]

The court may grant other just and equitable remedies, such as ordering that the aggrieved party be paid the cost of litigation,[223] where it refused to order a set aside- to avoid or minimize injustice.[224] It can also grant: declaratory orders, orders directing the administrator to act in an appropriate manner, and orders prohibiting him or her from acting in a particular manner.[225]

7 9 2 3 Damages and compensation

Where the court may no longer intervene in the challenged procurement, it may, in rare cases, direct the contracting authority or any other party to the proceedings to pay compensation or

[218] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22 paras 38-39; *Johannesburg City Council v Administrator, Transvaal* 1969 (2) SA 72 (T) 76D-G.
[219] See *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22 paras 35, 59-60, 101; *RHI Joint Venture v Minister of Roads and Public Works, Eastern Cape* (769102) [2003] ZAECHC 23 paras 49 & 51; *CFIT (Pty) Ltd v Minister of Defence* (22496/2013) [2015] ZAGPPHC 2 para 65(3); *Indiza Airport Management (Pty) Ltd v Msunduzi Municipality* [2012] ZAKZPHC 74 paras 44-45.
[220] See *RHI Joint Venture v Minister of Roads and Public Works, Eastern Cape* (769102) [2003] ZAECHC 23 paras 49 & 51; *CFIT (Pty) Ltd v Minister of Defence* (22496/2013) [2015] ZAGPPHC 2 para 65(3); *Indiza Airport Management (Pty) Ltd v Msunduzi Municipality* [2012] ZAKZPHC 74 paras 44-45.
[221] [2015] ZACC 22, 2015 (5) SA 245 (CC), 2015 (10) BCLR 1199 (CC).
[222] See also *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) 349G.
[223] PAJA 8(1)(f). See *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) paras 30-31; *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* [2010] ZASCA 13 para 26.
[224] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 36; *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* [2010] ZASCA 13 para 25.
[225] PAJA 8(1)(a), (b)&(d); *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) 146E.

damages.[226] This is limited to where the procurement process or decision is tainted with fraud, corruption, bad faith, or is completely outside the legitimate scope of the empowering provision;[227] and, where a successful tenderer incurred out-of-pocket expenses in order to comply in good faith with its contractual obligations under the award.[228] In the absence of these factors, both initially successful and unsuccessful tenderers cannot recover damages for loss of profits; out-of-pocket expenses in preparing the tender;[229] and, financial loss arising from the award which is subsequently set aside by a court.[230] The Constitutional Court held in *AllPay Consolidated Investment Holdings (Pty) Ltd v CEO SASSA (No 2)*[231] that the loss to an unsuccessful bidder from a wrongful procurement decision/action was no more than the loss of the opportunity to have its tender considered. Thus, it opined that other remedies will afford adequate redress to the aggrieved unsuccessful bidder. The practical reason for holding thus is the consideration of limited public resources.[232] While the legal reason is that a contracting authority's negligent but bona fide conduct in the public tender process would not be wrongful in a delictual sense, since it owes no legal duty to tenderers to avoid such losses.[233]

Although the burden of proof for compensation may be lighter than for damages,[234] the unfavourable disposition of South African courts toward granting damages would be the same towards compensation. First, both are similar in nature- they have negative impact on scarce public resources and on efficient public administration. Secondly, contractors are expected to

[226] PAJA s 8(1)(c)(ii) (bb). See Quinot (2011) *PPLR* 204; Quinot (2009) *TSAR* 446-447; Quinot (2008) *Stell LR* 101.

[227] *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA); *Transnet Limited v Sechaba Photoscan (Pty) Limited* 2005 (1) SA 299 (SCA); *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) 92; *South African Post Office v De Lacy* 2009 (5) SA 255 (SCA) 2-5, 14.

[228] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) paras 92-94.

[229] This "is always irrecoverable whatever the fate of the tender", according to the Constitutional Court in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 53.

[230] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC); LM Du Plessis & G Penfold, "Bill of Rights Jurisprudence" (2007) *Annual Survey of South African Law* 67, 93–94. Contra: *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) para 35(2)(e)(iii).

[231] [2014] ZACC 12 para 72. See *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* [2007] ZASCA 165; 2008 (2) SA 481 (SCA) para 25

[232] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) paras 55(c) & 81.

[233] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 54 & 56. Quinot (2008) *Stell LR* 101 argues that "From a public procurement perspective, this judgment is unfortunate."

[234] Bolton *Government Procurement* 332–333; Du Plessis & Penfold (2007) *Annual Survey of South African Law* 67, 93.

proceed with caution and mitigate and safeguard against losses where the tender is disputed.[235] Thirdly, PAJA section 8(1)(c)(ii)(bb), specifies that both apply only in exceptional cases. Notwithstanding, the possibility of awarding damages or compensation, though remote, adds to the effectiveness of the system, to wit, the power to award damages if intervention is no longer possible.

7 9 3 Enforcement

Orders of court are peremptory and the parties (especially contracting authorities) would usually abide by them without further ado.[236] Where a party to a procurement review fails to obey court order, instituting civil contempt proceedings may be the most viable option. First, the remedies readily granted in procurement cases in both jurisdictions are non-monetary, as seen immediately above. Thus, proceedings for enforcing money judgment would rarely apply. Secondly, contempt proceeding is fast and simple. A litigant can institute it by motion supported by affidavit.[237] Thirdly, it is effective in compelling obedience and deterring disobedience to court orders; as the proceeding may result in payment of fines or committal to prison (which may be suspended on condition that the order is complied with or the contempt is not repeated within a prescribed period).[238]

In rare cases of money judgments (damages, compensation or cost), the judgment creditor may file an application for a writ of execution to attach moveable or immovable property; or garnishee proceedings to attach creditor's money with a third party.[239] In Nigeria, if money is in the custody or control of a public officer or the court, the consent of the

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[235] Quinot (2008) *Stell LR* 115; Quinot (2011) *PPLR* 205; *Darson Construction (Pty) Ltd v City of Cape Town* 2007 (4) SA 488 (C) 506F-H & 509; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) paras 51-52, 55(c) & 81.

[236] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A); Superior Courts Act (SA) s 18.

[237] Nigeria: FHC Rules o 35 r 2; Sheriff and Civil Process Act Cap S6 LFN 2004 s 72; Judgments (Enforcement) Rules LN 40 of 1955 order IX rule 13; Nwadialo *Civil Procedure* 1033-1037; Ojukwu & Ojukwu *Civil Procedure* 358-360; *Hart v Hart* (1990) 1 NWLR 276 293; *Omoijahe v Umoru* (1999) 5 S.C (Pt III) 14; (1999) 8 NWLR (Pt 614) 178 181. SA: Fakie *NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52 paras 7, 55, 63-64; *Burchell v Burchell* (ECJ 010/2006) [2005] ZAECHC 35 paras 2 & 24. See also *Attorney-General v Crockett* 1911 TPD 893 917 922; *Cape Times Ltd v Union Trades Directories (Pty) Ltd* 1956 (1) SA 105 (N) 120D-E.

[238] Nigeria: Sheriff and Civil Process Act section 72; Ojukwu & Ojukwu *Civil Procedure* 358. SA: *S v Beyers* 1968 (3) SA at 80C-H; *Gentech Engineering Plastic CC v Reddy* (2462/2008, 1422/2009) [2011] ZAECPEHC 31 para 346(2); *Fakie NO v CCII Systems (Pty) Ltd* (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) paras 1 & 11.

[239] In accordance with: Nigeria- Sheriff and Civil Process Act ss 44 & 83; FHC Rules orders 36-37; - SA- Uniform Rules of Court rules 45 & 46.

appropriate officer[240] or court shall be obtained before garnishee order nisi will be ordered, according to section 8 of Sheriff and Civil Process Act Cap S6 LFN 2004.[241] In South Africa, proceedings for the satisfaction of final court orders sounding in money againt the State are subject to the special rules under the State Liability Act 20 of 1957 (as amended),[242] particularly section 3.

The foregoing satisfies the following elements of effectiveness: decisions of the review body (court) are binding; and, the decisions/remedies given are easily enforced by a fast and simple mechanism.

7 10 Summary of basic features of the judicial remedies regimes

A summary of the basic features of the judicial remedies mechanisms in both systems are set out below.

Features	Nigeria	South Africa
Enabling legislation	PPA section 54(7)	PAJA section 6(1) Constitution section 33(1), (2)
Nature of recourse	Judicial review	Judicial review
Grounds of recourse	Lack of authority, bias, error of law, noncompliance with a mandatory and material procedure, procedural unfairness, unreasonableness, failure to take a decision.	Lack of authority and unlawful delegation, bias, Failure to comply with mandatory and material procedure, procedural unfairness, error of law, action taken for wrong reasons or considerations, irrationality and unreasonableness, unconstitutionality or unlawfulness, failure to take a decision.

[240] The Attorney General of the Federation or the State.

[241] See *NNPC v Fawehinmi* (1998) 7 NWLR (Pt 559) 598; *Osimene v Commissioner for Agriculture, Water Resources and Rural Development* [2003] 22 WRN 125.

[242] Legal Succession to the South African Transport Services Act 9 of 1989; Constitution Consequential Amendments Act 201 of 1993; State Liability Amendment Act 14 of 2011.

Parties to suit	The parties in an initial procurement external administrative review and the BPP.	All persons mentioned under section 38 of the Constitution may apply. Respondents: contracting authority and the winning bidder.
Forum	Federal High Court (appeal may lie to the Court of Appeal, up to the Supreme Court).	High Court (appeal may lie to the Supreme Court of Appeal, up to the Constitutional Court).
Commencement and duration of review	Within 30 days after the receipt of BPP's review decision; or, after failure of BPP to give decision within deadline. No specified duration.	Not later than 180 days after concluding the applicable internal remedies proceeding; or after the applicant became or should have become aware of the challenged award decision. No specified duration.
The proceedings	Commenced by: (i) Motion or originating summons (where it is interpretation of law or documents) (ii) Writ of summons (where facts are disputed).	Commenced by notice of motion.
Interim relief	Interim or interlocutory injunction.	Interim interdict.
Final remedies	Certiorari or set aside order; mandatory order (mandamus); declaration; perpetual injunction.	Any just and equitable order, including: set aside order; remitting to the contracting authority for reconsideration; substitution order, declaratory

		order, restraining order; damages (if procurement is tainted with fraud or corruption).
Enforcement	Through civil contempt proceeding. Rarely, by writ of execution or garnishee (subject to Sheriff and Civil Process Act section 8)	Through civil contempt proceeding. Rarely by writ of execution or garnishee (subject to State Liability Act section 3)

7 11 Conclusion and analysis

From the foregoing, procurement judicial remedies in both jurisdictions are substantially effective in relation to the relevant elements considered. This is because procurement judicial review in both jurisdictions runs on existing well-structured or properly designed judicial systems. Nevertheless, certain factors adversely affect the advantages of the mechanisms.

First, only general remedies apply; which are not always well suited to public procurement context.[243] For example, in the Nigerian case of *Cupero Nigeria Limited v Federal Ministry of Water Resources*,[244] the court agreed with BPP's review decision to award the procurement contract to the lowest responsive bidder who was unlawfully denied the award; nevertheless, it set aside the decision for BPP's failure to inform *all* interested bidders of the review. In quashing the decision, the court leaned too heavily on the principle of fair hearing, which should have applied only limitedly within the context; since the right of the other unsuccessful bidders (who did not challenge or indicate interest to be joined) was not affected. In the South African case, *Steenkamp NO v Provincial Tender Board, Eastern Cape*,[245] the courts neither granted damages nor an alternative remedy for the loss the initially successful tenderer incurred from relying on the award that was subsequently invalidated.[246] There is accordingly a need to mould remedies to suit the public procurement context. Some South African judges have recognised and addressed this need. The wide power of the court to "grant

[243] Quinot (2011) *PPLR* 205.
[244] FHC(Abuja) 12-6-2012 suit no FHC/Abj/CS/867/11.
[245] 2006 (3) SA 151 (SCA); 2007 (3) SA 121 (CC).
[246] See also *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* 2009 (1) SA 163 (SCA) 18.

any order that is just and equitable" under section 8 of PAJA supports this. In *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province*,[247] the court ordered a conditional set-aside, which required affected tenders to be re-evaluated, while allowing service delivery from the challenged procurement to go on uninterrupted until conclusion of re-evaluation.[248] Nigerian courts may be less inclined to fashioning remedies that suit public procurement context, as an equivalent of PAJA's remedies does not exist; and, as seen above, they still apply judicial review remedies restrictively.[249] However, the availability of viable administrative remedies in Nigeria largely makes judicial recourse an avoidable last resort.

Secondly, the systems are bedevilled by long duration of cases; high cost of litigation, presumptive inconclusiveness of remedies pending the determination of multiple appeals; some judges' lack of procurement-related technical knowledge; and disruption caused by suspension and set aside orders against administration and related service delivery.[250] Some of these problems could be addressed by appropriate legislation. For example, legislation could fix exact duration (for instance, 90 working days) for completion of procurement matters; and limit its adjudication to the court of first instance,[251] with permission to appeal only by leave of court where it is satisfied that the appeal discloses a novel or significant issue of law that requires the attention of a higher court. If an adjudication deadline for procurement matters is fixed, special procedural rules would have to be made to ensure achievement of the deadline.[252] This would ensure that the courts will handle procurement matters expeditiously. The other problems, such as cost of litigation, disruptions, and judges' lack of technical expertise, could be ameliorated by streamlining or strengthening the administrative review mechanisms.

Thirdly; decisions of Nigeria's FHC are currently seldom reported. Thus, it is quite difficult to access procurement decisions of the court, which ought to serve as precedent for determining subsequent cases and assessing the viability of proposed ones. The Nigerian Court of Appeal

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[247] 2008 (2) SA 481 (SCA).

[248] See Quinot [2009] *TSAR* 445; *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA) 7-8; *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA).

[249] 7 9 1.

[250] See Quinot (2011) *PPLR* 207; Quinot "Supplier Remedies" in *Public Procurement Regulation* 313-314. Also, Gordon (2006) *Pub Cont L J* 437; Penal Reform International *Access to justice in Sub Saharan Africa: The Role of Traditional and Informal Justice Systems* (2000) 17; Pachnou *Bidder Remedies* ch 8 s 2.

[251] Section 175 (3) & (4) of Kenya's PPA (inspired by the UNICITRAL Model Law) makes Court of Appeal's decision on procurement matter final, and fixes 45 days as adjudication deadline, both at the High Court and the Court of Appeal. See Udeh (2013) *PPLR* 198-199. In Nigeria, the Jigawa State Due Process and Project Monitoring Bureau Law 2012, s 25(8) limits procurement challenge to administrative review.

[252] For Nigeria, the Chief Judge of the FHC can make such rules: CFRN s 254; FHC Act s 44. For South Africa, it is the Rules Board for Courts of Law: s 2 of the Rules Board for Courts of Law Act; PAJA s 7(3)).

and Supreme Court, whose decisions are fully reported, have hardly dealt with appeals on procurement. Procurement cases that are ripe do not frequently come before the Nigerian courts, owing to the effective administrative review remedies that must be exhausted before judicial recourse. Besides, the current public procurement regime is nascent. The BPP in collaboration with the FHC Registry could undertake reporting procurement decisions of the court. For South Africa, the South African Legal Information Institute has a free-public-access online database of reported and unreported decisions of South African courts, containing a trove of procurement cases.[253] This affords a rich source of public procurement case law for decision-making and research.

Having looked at the countries' administrative review mechanisms in chapters 5 and 6, and presented the judicial remedies here; the other remedies to procurement challenge are considered in the next chapter.

[253] Go to <http://www.saflii.org/> (accessed 06-10-2017).

Chapter 8

Other Remedies and Enforcement Mechanisms

8 1 Introduction

This chapter examines the mechanisms, other than bidder remedies, for addressing grievances or breaches in public procurement and enforcing procurement regulations. There are referred to here as secondary remedies, since bidder remedies is regarded as the foremost means of enforcing procurement regulation by the actions of aggrieved bidders.[1] The mechanisms considered in this chapter are: alternative dispute resolution (ADR); investigation, administrative remedial actions, and sanctions; audit; and CSOs' action.

Although bidder remedies constitute the foremost means of enforcing procurement regulations,[2] secondary remedies have their advantageous, as will be discussed below. It suffices here to note that apart from ADR, the secondary remedies may be initiated or triggered by persons other than bidders or procuring entities. Thus, these mechanisms open up procurement enforcement to wider participation.

8 2 ADR

ADR refers to "any method of resolving issues susceptible to normal legal process by agreement rather than by an imposed binding decision".[3] Some of the relevant ADR methods include: negotiation, mediation, conciliation, and arbitration. Negotiation is the process of working out an agreement by direct communication of the parties.[4] Conciliation is a process in which an independent third party assists the parties to settle their difference; but may, if necessary, deliver his opinion as to the merits of the dispute.[5] Mediation is a process in which an independent third party assists the parties to settle their difference; but does not advise them as to the issues and merits of the dispute.[6] The terms conciliation and mediation are often used

[1] Guide to Enactment Ch VIII para 2 228: for it makes the systems to "an important degree self-policing and self-enforcing".
[2] See Guide to Enactment ch VIII, para 2, 228; Gordons (2006) *Pub Contract LJ* 427, 428, 430-431, 445; Quinot "Supplier Remedies" in *Public Procurement Regulation* 308; Marshal *et al* (1991) *Hofstra L Rev* 4; Cofee Jr (1986) 86 *Colum L Rev* 669; Lees (2002) *PPLR* n 3. See also 2 3 2 2 above.
[3] Academy of Experts "The Language of ADR: An International Glossary of ADR Terms" (2004) 1 *Negotiation & Dispute Resolution Journal* 119.
[4] 122.
[5] 199.
[6] 121.

interchangeably.[7] Arbitration involves one or more neutral third parties who are usually agreed to by parties and whose decisions are binding.[8]

Some of these ADR mechanisms may either be used as an alternative to (where allowed) or an integral part of the bidder remedies systems, as discussed below.

8 2 1 Nigeria

The PPA does not provide for ADR as a pre-contract dispute resolution mechanism; although section 16(26) requires all procurement contracts to provide for arbitral proceeding as the primary form of contract dispute resolution.[9] However, ADR may be integrated into the internal review proceedings.[10] Also, it may serve as a court-supported alternative to judicial remedies.

Negotiation or mediation may be incorporated into the internal review stage in two ways. First, the aggrieved bidder, when submitting a complaint, may request that it be resolved by mediation or negotiation. Secondly, an accounting officer may on his own initiative opt to resolve complaints by mediation or negotiation. Mediation here will entail inviting an external independent third-party to facilitate the review or dispute resolution process. The PPA does not prescribe procedure for an accounting officer's internal review functions. Section 54(2) (b) only states that he shall, on reviewing a complaint, "make a decision in writing within 15 working days indicating the corrective measures to take".[11] Thus, it is valid for an accounting officer to review and reach his decision through negotiation or mediation. Arbitration would be inappropriate for this purpose, as an accounting officer cannot transfer his review decision-making power to an arbitrator(s).[12] In addition, it is unlikely that an arbitral panel could be set up and have its proceedings completed within the fifteen days deadline for internal review.

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[7] 121

[8] Garner *Black's Law Dictionary* 119.

[9] This is the standard practice in many jurisdictions: see Bolton *Government Procurement* 346, M Aronson & H Whitmore *Public Torts and Contracts* (1982) 231; SD Cirell & J Bennett *Compulsory Competitive Tendering: Law and Practice* (1991) para 12.16; A Ashworth *Contractual Procedures in the Construction Industry* 5 ed (2006) 49-50.

[10] ADR proceedings parallel to internal review may be impracticable considering that the short commencement time for internal review may elapse while attempting to arrange for ADR, thus foreclosing review; also, the accounting officer (the internal review authority) is necessarily the one that spearheads the ADR proceedings.

[11] See also PPA s 19(f).

[12] *Delegatus non potest delegare* applies. See *Yakasai v Nigerian Air Force* [2002] 15 NWLR (Pt 790) 294; *Okoro v Delta Steel Co Ltd* (1990) 2 NWLR (Pt 130) 87; *NNPC v Trinity Mills Ins. Brokers* [2003] 9 NWLR (Pt 825) 384; AS Ogwuche (ed) *Compendium of Laws under the Nigerian Legal System* vol 1 2 Ed (2008) 60-61; M Aronson & M Groves *Judicial Review of Administrative Action* 5 ed (2013) 6.20-6.40.

Besides, an arbitral proceeding cannot be unilaterally set up by a party; as it must be based on an existing written arbitration agreement.[13]

Where an accounting officer decides to integrate negotiation in the internal review, he would invite the complainant and probably other interested bidders to negotiate resolution. Afterwards, he may adopt the agreed resolution as his review decision in writing. Where conciliation/mediation is used, an accounting officer would appoint a conciliator/mediator to facilitate amicable resolution of the complaint.[14] He may then adopt the agreed resolution as his review decision in writing. In the two instances, the process must be completed within the fifteen working days deadline for internal review.

The above ADR options are advantageous. First, they enhance the acceptability of the review decision, as the aggrieved party is actively involved in decision making; and this may significantly reduce the likelihood of the case proceeding to external review before the BPP. Secondly, they may resolve the dispute without straining the cordial relationship among the parties. Thirdly, they tone down the likelihood of bias inherent in internal review;[15] as the parties are involved in the decision-making, and conciliators/mediators are independent.

However, in relation to the BPP' external review, incorporating ADR in the proceedings may be unsuitable, as the BPP is an independent review body, with power to give binding decision within short deadline. In addition, the BPP's review procedures, as prescribed by legislation, do not accommodate ADR. Besides, the parties cannot negotiate or settle contrary to the terms of BPP's review decision; they either abide by the BPP's decision or they challenge it in court.

At the stage of judicial recourse, the parties require the leave of court to resort to ADR. The matter must first be instituted in court; and the court requested to adjourn it, to enable the parties to attempt settlement by ADR. With this, the parties' right to judicial recourse will not be foreclosed when its commencement time elapses. If the parties settle, they may either apply to the court to enter the written terms of settlement as its consent judgment; or apply for the

[13] Arbitration and Conciliation Act CAP A18 LFN 2004 s 1. See *Compagnie Generale De Geophysique v Jackson Etuk* [2004] 1 NWLR [Pt 853] 20; also: *Kano State Urban Development Board v Fanz Construction Co Ltd* (1986) 5 NWLR (pt 39) 74; *Commerce Assurance Ltd v Alli* (1992) 3 NWLR (pt 232) 701; GC Nwakoby *The Law and Practice of Commercial Arbitration in Nigeria* (2004) 19-23.

[14] See O Olagunju *Peacemaking* (2002) 74-103 for general mediation procedures.

[15] See 5 3 6 1 above.

matter to be discontinued and struck out.[16] Incorporating ADR during judicial review is worthwhile, considering the long duration and high cost of litigation in Nigeria.[17]

8 2 2 South Africa

According to section 44 of the MFMA, attempts must be made to resolve out of court (by ADR) disputes that arise where a municipality or municipal entity engages another organ of state for the procurement of good and services.[18] The National Treasury (if it is not a party to the dispute) or any third party may be engaged as a mediator in this regard.[19] The National Treasury may determine the mediation process where it is in engaged as the mediator.[20]

Perhaps, ADR may be an option for resolving procurement disputes before resort to court, if the contracting authority and the aggrieved bidder agree. For example, an aggrieved bidder, or a contracting authority that receives a complaint or is sued, may request and obtain the consent of the other party to settle the matter by a particular ADR method.[21] A contracting authority could also incorporate in the solicitation or bidding document that the resolution of the procurement dispute shall be by a specified ADR proceeding. This practice is permissible under general principles of contract, particularly invitation to treat, offer and acceptance; and, the relevant legislation is not against it.[22] Also, South African external administrative review is largely unviable and ineffective; thus, warranting resort to viable redress options, such as ADR, where applicable. However, the SCA in *Telkom SA Ltd v ZTE Mzanzi (Pty) Ltd*[23] held that such term in the solicitation/bidding document does not impose a "contractual obligation"

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[16] The first type is referred to as "settlement in court", and the second "settlement out of court". See Ojukwu & Ojukwu *Civil Procedure* 297. See, on consent judgment: Nwadialo *Civil Procedure* 508-511; *Joseph Afolabi v John Adekunle* (1983) 8 SC 98 100; *Afegbai v AG Edo State* [2001] 33 WRN 29; *UBN Plc v Edamkue* 7 NWLR (pt 925) 520; also, *Green v Rozen* (1955) 2 All ER 797; *Lees v Motor Insurance Bureau* (1955) 1 WLR 620. On discontinuance: Nwadialo *Civil Procedure* 485-486; *Spincer v Watts* (1889) 23 QB 350; *Nwachukwu v Nze* (1955) 15 WACA 36.

[17] See 7 11 above.

[18] See ss 110(2), 41 & 42 of MFMA.

[19] Section 44(2).

[20] Section 44(3).

[21] See *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd* 2011 (4) SA 642 (GSJ) paras 6-10, 24; *Cachalia v Harberer & Co* 1905 TS 457 462 – 464.

[22] See 5 3 2 2 & 6 11 2 above. See examples of the practice in: *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd* 2011 (4) SA 642 (GSJ) para 9; *ZTE Mzanzi (Pty) Ltd v Telkom SA Ltd* [2012] ZAGPPHC 50 para 26-27. However, an ADR clause intended for contract dispute will not apply to tender dispute: *Telkom SA Ltd v ZTE Mzanzi (Pty) Ltd* [2013] ZASCA 14 para 8; *MCB Business Solution t/a Africa Business Solutions v Premier of the Northern Cape* [2006] ZANCHC 30 para 26.

[23] [2013] ZASCA 14 para 8.

on the parties to resolve a tender dispute by the prescribed ADR.[24] Thus, consent to undertake ADR is still required in such circumstance. Although the Constitutional Court, in *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO of SASSA*,[25] opined that: "Request for Proposals (solicitation/bidding documents) … *constituted the legally binding and enforceable framework* within which tenders had to be submitted, evaluated and awarded";[26] it does not obviate the contractual nexus required between the bidders and the contracting authority for ADR to be invoked. Another impediment is that the High Court in *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd*,[27] held that public procurement disputes in South Africa are constitutional disputes, which are ostensibly not justiciable in ADR settings.

In any case, agreeing to and opting for an ADR does not foreclose recourse to procurement administrative or judicial review.[28] An ADR clause would be invalid if it stipulates that the proceeding shall be final; as it will deny an aggrieved party the constitutional right to judicial review of administrative action.[29] Also, the court may refuse to grant a stay of judicial review proceeding applied to enable the parties to first exhaust the ADR as agreed, if the stay would be inconvenient or the outcome of the ADR is doubtful.[30] An arbitral proceeding to resolve a tender dispute would be invalid if the parties regarded and conducted it as a judicial review.[31] In *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd*,[32] an aggrieved bidder applied for judicial review to challenge a tender decision; however, the parties discontinued the proceeding, to undertake arbitration as provided in the solicitation document, which they however regarded as a continuation of the judicial review proceedings. The court held that "s 7(4) of PAJA precludes any forum, apart from the High Court and the Constitutional Court, to adjudicate over claims brought in terms of PAJA (judicial review)".[33]

Furthermore, the fact that procurement decisions in South Africa are viewed as administrative action, and the resolution of its disputes ordinarily attracts public law remedies

[24] See also *Golden Arrow Bus Services (Pty) Ltd v City of Cape Town* [2013] ZASCA 154; [2014] 1 All SA 627 (SCA) para 27.
[25] [2013] ZACC 42, 2014 (1) BCLR 1 (CC) paras 38 & 40.
[26] Emphasis added. See also *ZTE Mzanzi (Pty) Ltd v Telkom SA Ltd* [2012] ZAGPPHC 50 para 36 (overruled in *Telkom SA Ltd v ZTE Mzanzi (Pty) Ltd* [2013] ZASCA 14); Volmink (2014) *APPLJ* 45.
[27] 2011 (4) SA 642 (GSJ) para 67.
[28] *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd* 2011 (4) SA 642 (GSJ) para 41, 55.
[29] Paras 10, 41, 54, 67-68. See SA Constitution s 33(1) &(2); PAJA s 6.
[30] *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd* 2011 (4) SA 642 (GSJ) paras 73-76.
[31] Paras 21, 27, 39.2, 67-68.
[32] 2011 (4) SA 642 (GSJ).
[33] Para 67. Emphasis added.

and not private law remedies,[34] may affect the attitude of courts regarding the application of ADR to procurement. Perhaps the courts may be reluctant to support (such as ordering a stay of judicial proceeding to enable exhaustion of ADR) or order resolution of procurement dispute through ADR, even where the parties had agreed to an ADR.[35]

8 2 3 Analysis

On the whole, resolving public procurement disputes by ADR in Nigeria and South Africa is quite limited.

Notwithstanding the above, opting for ADR, where applicable, in resolving public procurement disputes could be advantageous.[36] It saves time, cost and energy for parties, compared to litigation. This is even more apt for South Africa as it aligns with its constitutional principal of cost-effectiveness of the procurement system. ADR proceedings and outcome are flexible and under the parties' control. The parties have the opportunity to reach settlement beyond traditional judicial remedies. ADR usually protects the privacy of the parties and the confidentiality of communications and presentations during the proceedings. Amicable settlement is pursued within a convivial atmosphere, and existing business relationships are preserved.

The disadvantage of resorting to ADR for resolving procurement disputes is that the focus is not on enforcing compliance with procurement regulations, but on reaching a compromise. This is unlike the public law remedies available in review proceedings, whose purpose is to pre-empt or correct or reverse an improper administrative function; and focuses on affording the prejudiced party administrative justice, advancing efficient and effective public administration based on constitutional precepts, and entrenching the rule of law.[37] In ADR, an infraction may be left unaddressed where the parties are happy with the outcome of the ADR. It is even possible that a procuring entity may compromise a subsequent procurement process to favour the aggrieved bidder as a form of settlement.[38] However, the following could minimise such occurrence: taking records of the ADR proceedings, publishing the decisions

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[34] *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 para 29.

[35] *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd* 2011 (4) SA 642 (GSJ).

[36] See Lees (2002) *PPLR* 143-144.

[37] *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 para 29.

[38] See for example, *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* [2016] ZASCA 143, [2016] 4 All SA 842 (SCA), 2017 (2) SA 63 (SCA) para 1-14.

reached, and holding debriefing session on the proceeding with interested bidders.[39] Also, the investigative functions of relevant authorities, discussed below, may curb such occurrence.

8 3 Investigation, administrative remedial action and sanction

Public procurement is prone to abuse and corruption[40] owing to various factors, including: the large sums involved; possible conflict of interest of officials ("principal-agency problem");[41] and, a level of unsupervised discretion involved.[42] Some abuses may go on undetected or unchallenged by affected suppliers. An investigation by relevant authorities may be the effective law enforcement option or remedy in such cases. It serves to detect abuses; which may lead to outcomes such as administrative remedial actions, prosecution and sanctions, geared towards preventing and redressing such abuses. These mechanisms apply to bidders, contractors, procuring entities and their officials; and to both pre and post contractual matters.

This section takes a look at the procedures for triggering and undertaking the aforementioned processes; the authorities involved; and their outcomes and limitations.

8 3 1 Nigeria

8 3 1 1 Investigation

The BPP may recommend to a "relevant authority" to investigate any matter related to the conduct of public procurement proceedings, or the conclusion or implementation of a procurement contract, if it considers that such is necessary to prevent or detect a contravention of the PPA.[43] The "relevant authority" includes: the Economic and Financial Crimes Commission (EFCC), and the Independent Corrupt Practices Commission (ICPC).[44] The BPP has so far referred more than 50 companies to the EFCC for investigation and prosecution, over falsification of information to obtain government contracts; and recommended four staff of some government agencies for prosecution, for attempting to compromise the procurement

[39] These accord with transparency and equity enshrined under the SA Constitution s 217(1); and Nigerian PPA s 16(1)(d).

[40] See Soreide *Corruption in Public procurement*; Anechiarico & Jacobs *The Pursuit of Absolute Integrity* ch 8; Kelman *Procurement and Public Management*; William-Elegbe *Fighting Corruption* 25; Williams-Elegbe "Corruption and Public Procurement" in *Procurement Regulation* 337, 345.

[41] Marshall, *et al* (1991) *Hofstra L Rev* 11.

[42] William-Elegbe *Fighting Corruption* 25; Williams-Elegbe "Corruption and Public Procurement" in *Procurement Regulation* 337, 345.

[43] PPA s 53(1); also, s 6(1)(d)(i), (h) & (j).

[44] PPA s 60. See s 6 of Economic and Financial Crimes Commission (Establishment) Act 2004 (EFCC Act); and, ss 9 & 10 of Corrupt Practices and other Related Offences Act 2003 (ICPC Act).

procedure of the Federal Government.[45] In addition, these investigative authorities may of their own accord investigate any suspected criminality in public procurement.[46]

Interested members of the public, including bidders and procuring entities, may instigate such investigation by writing a petition or reporting an alleged or likely contravention of the PPA to the BPP. For example, a CSO, Civil Society Network Against Corruption, in August 2016 petitioned the BPP about a federal agency that had in 2016 budget sought the sum of N4.4 billion for the purchase of its headquarters building, notwithstanding that it had earlier in 2013 awarded a contract for its construction.[47] The petition was to instigate investigation which will lead to the suspension of the proposed purchase; thus preventing possible waste of funds and fraud, contrary to the PPA.[48] Such petitions may also be written directly to the EFCC or ICPC, pursuant to their enabling Acts.[49] However, it is preferable to route it through the BPP; as it could follow up with these authorities and finally take its resultant remedial actions as discussed immediately below.

The relevant authority may in the course of its investigation: (i) require a staff or agent of the procuring entity, bidder or contractor concerned, to provide relevant information; or explain entries in or produce related books, records, accounts or documents; or (ii) it may

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[45] B Agande "Contracts: BPP Drags 50 Firms to EFCC over False Information" *Vangaurd* (12-11-2013) <http://www.vanguardngr.com/2013/11/contracts-bpp-drags-50-firms-efcc-false-information/> (accessed 11-11-2017); BPP "Articles" (01-09-2017) *BPP* http://bpp.gov.ng/index.php?option=com_content&view=article&id=175&catid=83 (accessed 01-09-2017). The BPP itself has in some occasions been investigated for alleged corrupt practices in carrying out its functions. See H Umoru "Senate probes alleged corruption in BPP" (11-05-2017) *Vanguard* <https://www.vanguardngr.com/2017/05/senate-probes-alleged-corruption-bpp/> (accessed 01-02-2018); Punch "Reps to probe BPP over indiscriminate issuance of certificate" (02-03-2017) *Punch* < http://punchng.com/reps-to-probe-bpp-over-indiscriminate-issuance-of-certificate/> (accessed 01-02-2018).

[46] See EFCC Act s 6(1)(h) and ICPC Act ss 31 & 48. See EFCC "Re: DSS, EFCC in Fresh Face-Off over Invitation to SSS Operatives" (07-11-2017) *EFCC* <https://efccnigeria.org/efcc/news/2854-re-dss-efcc-in-fresh-face-off-over-invitation-to-sss-operatives> (accessed 01-02-2018); Punch "Alleged N919m fraud: EFCC, ICPC begin probe of suspended NHIS boss" (27-12-2017) *Punch* < http://punchng.com/alleged-n919m-fraud-efcc-icpc-begin-probe-of-suspended-nhis-boss/> (accessed 01-02-2018); D Adebayo "FG awaiting EFCC investigation on NITDA's 2017 Budget – Communications Minister, Adebayo Shittu" (06-11-2017) *Daily Post* <http://dailypost.ng/2017/11/06/fg-awaiting-efcc-investigation-nitdas-2017-budget-communications-minister-adebayo-shittu/> (accessed 01-02-2018); S Opejobi "$2.1bn arms fraud: EFCC reveals why it invited DSS operatives" (08-11-2017) *Daily Post* <http://dailypost.ng/2017/11/08/2-1bn-arms-fraud-efcc-reveals-invited-dss-operatives/> (accessed 01-02-2018).

[47] News Express "Group Petitions BPP, Seeks Investigation of CCB's Proposal for Purchase of Secretariat" *News Express* (22-08-2016) < http://www.newsexpressngr.com/news/27416-Group-petitions-BPP-seeks-investigation-of-CCBs-proposal-for-purchase-of-secretariat> (accessed 11-11-2017).

[48] Sections 5(n), 16(1)(e) & (f), 58(4)(b).

[49] EFCC Act s 6(1)(h) and ICPC Act ss 31 & 48.

search for, remove, examine and make extracts or copies of them.[50] On completion of the investigation, the relevant authority informs the BPP and the procuring entity of its findings.[51]

8 3 1 2 Remedial actions

If the BPP is satisfied from the findings that a breach of the PPA or any regulations had occurred, it shall take actions to rectify the contravention, which include:

(a) nullification of the procurement proceedings;

(b) cancellation of the procurement contract;

(c) ratification of anything done in relation to the proceedings; or

(d) a declaration consistent with any relevant provisions of the PPA.[52]

The BPP, following its own or a relevant authority's findings,[53] may also debar any guilty bidder or contractor from participating in federal government procurement for a period it may determine.[54] Although the duration is not stipulated, it is assumed that it would depend on the severity of the contravention. The names of such debarred suppliers shall be published on BPP's website and the Procurement Journal.[55] The publication notifies federal procuring entities to comply with the debarment. If a contract is awarded to a debarred supplier, the BPP may withhold its Certificate of No Objection, required for payment of contract.[56] Besides, a supplier interested in that contract may challenge such award and have it set aside.[57]

In addition, the BPP may issue a variation order requiring a contractor at his own expense to repair, replace, or to do anything in the contract left undone or found to have been carried out with inferior or defective materials or with less skill and expertise than required by the contract.[58]

The above actions that the BPP may take to rectify identified contravention are more extensive than the remedies available under BPP's administrative review, as the latter does not apply to contract administration stages. The BPP's remedial actions may be reviewed by the

[50] PPA s 53(2).
[51] PPA s 53(5).
[52] PPA s 53(4).
[53] BPP http://www.bpp.gov.ng/index.php?option=com_content&view=article&id=141:bpp-s-stakeholders-workshop-on-debarment-procedure&catid=83:latest-news (accessed 25-08-2017)
[54] PPA s 6(1)(e). See 8 3 1 3 for debarment resulting from court sentence.
[55] PPA s 6(1)(g).
[56] Sections 6(1)(b); 16(1)(b) & (2), (4); 19(h); 60.
[57] Section 16(4).
[58] Section 53 (3).

Federal High Court (FHC);[59] if an aggrieved party sues within three months of such action,[60] after giving BPP a 30 day notice of intention to sue.[61]

8 3 1 3 Prosecution and sanctions

Where the investigation discloses an offence, the relevant authority that investigated the matter shall take all necessary steps to commence prosecution.[62] This entails reporting its findings to the Attorney General of the Federation (AGF).[63] The AGF or any of his officers or agent may prosecute the offender(s) on behalf of the Federal Republic of Nigeria,[64] at the FHC.[65] The procedure for the prosecution shall be as provided by the Administration of Criminal Justice Act 2015.[66]

The PPA creates specific offences, which include the following. [67]

1. Entering or attempting to enter into a collusive agreement with a supplier, contractor or consultant where the prices quoted in their respective bids are or would be higher than would have been the case in the absence of the collusion.
2. Conducting or attempting to conduct procurement fraud by means of fraudulent and corrupt acts, unlawful influence, undue interest, favor, agreement, or bribery.
3. Influencing or attempting to influence in any manner the procurement process to obtain an unfair advantage in the award of a procurement contract.
4. Splitting of tenders to enable the evasion of monetary thresholds set; and bid-rigging.[68]
5. Altering any procurement document with intent to influence the outcome of a procurement proceeding.
6. Using fake documents or encouraging their use.
7. Willful refusal to allow the BPP or its officers to have access to any procurement records.

[59] CFRN s 251(1)(r).
[60] Public Officers Protection Act s 2(a).
[61] PPA s 14(1).
[62] PPA s 53(5).
[63] Combined reading of ss 53(5) & 58(3) of the PPA. See CFRN ss 150 & 174.
[64] PPA ss 58(3); CFRN s 174(2).
[65] PPA s 58(2).
[66] See s 2.
[67] PPA s 58 (4)-(11).
[68] Bid-rigging means "an agreement between persons whereby offers submitted have been pre-arranged between them; or, their conduct has had the effect of directly or indirectly restricting free and open competition, distorting the competitiveness of the procurement process and leading to and escalation or increase in costs or loss of value to the national treasury.": PPA s 58(10).

All the offences under the PPA, presented above, carry the same penalty for the same class of persons, as listed in 1-4 below. In other words, the penalty that a person will suffer under the PPA for any of the offences is the same, as fixed for the class he falls under. The penalties that the various classes of persons will bear for being convicted for any of the offences are as follows.[69]

1. An officer of the BPP or any procuring entity: imprisonment of not less than five calendar years without any option of fine; and summary dismissal from government services.
2. Any legal person: debarment from all public procurements for a period not less than five calendar years; and a fine equivalent to 25% of the value of the procurement in issue;
3. Every registered director of a convicted company: not less than three calendar years but not exceeding five calendar years without an option of fine.
4. A natural person that is not a public officer: imprisonment for not less than five calendar years, but not exceeding ten calendar years without an option of fine.

Penalty in 3 above is arguably disproportionate, as the PPA does not prescribe the elements that make the directors criminally liable; such as complicity in committing the offence, direct or implied knowledge of the offence, control of the affairs of the convicted company, etc. This is more grievous than a strict liability offence, for there is an absence of both *actus reus* and *mens rea*,[70] as conviction is based only on ground of being a registered director of such company. Some directors do not engage in the day to day running of their companies. It may be inappropriate to hold a person guilty for an offence, only by reason of his official position; without requiring proof that he acted, omitted to act or had culpable intention or knowledge with respect to the offence. This is arguably unconstitutional, as section 36(5) of the Constitution requires that every person's guilt must be proved before he loses presumption of innocence. Thus, the guilt of a director for the offence committed by the company should be proved before he can be convicted of it. If the court agrees with the above view it would invalidate the affected provision of the PPA,[71] by virtue of the supremacy of constitution.[72] Even if the court does not so hold, it may read the requirement to establish

[69] PPA s 58 (1), (5)-(7).
[70] See Garner *Black's Law Dictionary* 998; JLJ Edwards *Mens Rea in Statutory Offences* (1955) 247; *Lim Chin Aik v R* (3) [1963] AC 174, [1963] 1 All ER 228; *R v Agu* (4) 12 WACA 489; *Brend v Wood* (1) (175 LT 307, 62 TLR 463; *Yakubu v Federal Republic of Nigeria* [2009] 14 NWLR (pt 1160) 151.
[71] Section 58(7).
[72] CFRN s 1(3)

personal guilt of the directors into the affected provision, especially since the offence is a felony.[73]

Where there are persistent or serious breaches of the PPA or its regulations, the BPP may recommend to the National Council on Public Procurement (NCPP) as follows.[74]

1. The suspension of officers concerned with the procurement or disposal proceeding.
2. The replacement of the head or any of the members of the procuring or disposal unit of any entity or the Chairperson of the Tenders Board.
3. The discipline of the accounting officer of the procuring entity.
4. The temporary transfer of the procuring and disposal function of the entity to a third party procurement agency or consultant.
5. Any other sanction that the BPP may consider appropriate.

However, as the NCPP is yet to be inaugurated,[75] the above administrative measures are currently inchoate.[76]

8 3 2 South Africa

8 3 2 1 Investigation

The South African authorities that may investigate procurement irregularities include: the National Treasury/Office of Chief Procurement Officer (OCPO), the Public Protector, and the National Prosecuting Authority (NPA). Their jurisdiction extends to the three tiers of government. The accounting officers or accounting authorities of contracting entities may also investigate procurement irregularities.[77] These institutions have powers to take certain remedial actions, based on their investigation, as discussed immediately below. The significance of this, among other relevant issues, are analysed under 8 3 3 below.

a. National Treasury

The National Treasury is empowered by the PFMA section 6(2)(e) to investigate any system of financial management (including procurement) in any department, public entity or constitutional institution. The purpose of this power is not to investigate the conduct of any

[73] See Criminal Code Act Cap C38 LFN 2004 s 3; *R v Gray* L & C 365; *R v Prince* Law Rep 2 CCR 154; *The Queen v Tolson* (1889) 23 QBD 168.
[74] PPA s 6(1)(i).
[75] Pursuant to PPA s 1(4),
[76] See generally Udeh (2015) *APPLJ* 1; also, Udeh "Nigeria" in *Procurement Regulation* 149.
[77] Treasury Regulation 16A9.1(b); Municipal SCM Regulations 38(1)(b). The extent of and procedure for exercising this power are not regulated; thus are not discussed below. But see 8 3 2 2-3 below for its outcomes.

particular person, but the institutions' financial or SCM system.[78] The Treasury may commence an investigation on its own initiative or based on a request by a public entity;[79] or on a complaint received from any member of the public, including suppliers.[80]

The Treasury may appoint or mandate an investigator or a team of investigators to conduct the investigation within a given period. The investigators would send their investigation plan or notice to the stakeholders and respondents to enable them prepare and attend when required.[81] The proceeding entails the investigators interviewing the respondents, in addition to respondents making representations or presenting evidence.[82] At the end, the investigators will compile a report, containing their findings and recommendations, and submit to the Treasury, and where appropriate, to the requesting authority.[83]

In other instances, the Treasury's response to a request for investigation or a complaint is that the OCPO would write a letter to the accounting authority or officer of the contracting authority, requesting documents/records of the affected procurement.[84] The OCPO reviews the documents/records to determine if the process followed was in accordance with the SCM standards;[85] after which it compiles a report containing its findings and recommendations.[86]

b. Public protector

The Public Protector, established in terms of chapter 9 of the Constitution, is empowered to investigate all complaints or allegations of improper conduct by public officials in all spheres of government (except court's decisions).[87] It may investigate improprieties in public procurement, by its own initiative or as reported to it.[88] A person, such as an aggrieved bidder, may report a matter by means of a written or oral declaration under oath or affirmation; stating: the nature of the matter, the grounds necessitating an investigation, and all other relevant

[78] *The National Treasury v Kubukeli* [2015] ZASCA 141, [2016] 1 All SA 30 (SCA), 2016 (2) SA 507 (SCA) para 24.
[79] Paras 1-2. See National Treasury *2015 Public Sector Supply Chain Management Review* (2015) 19.
[80] Treasury Regulations reg 16A9.3.
[81] See *The National Treasury v Kubukeli* [2015] ZASCA 141 paras 3-5.
[82] 3-7.
[83] 7-11.
[84] Statement by Bonolo Moloto, SCM Monitoring and Compliance, OCPO (email correspondence, Bonolo.Moloto@treasury.gov.za, 11-05-2016).
[85] Post contract cases may require site inspection to verify compliance with the specification and existence of projects.
[86] Moloto 11-05-2016.
[87] Constitution s 182(1). See 3 3 3 2 above.
[88] Public Protector Act 6(1) & (4)(a).

information known to him or her.[89] Such report must be made within two years from the occurrence of the incident or matter concerned.[90] Reports outside this deadline shall be rejected except the Public Protector accepts it.[91] This ensures that matters are promptly reported, which enhances evidence gathering and chances of remedying improprieties. The Public Protector may refuse to investigate such reported matter if the person prejudiced by the conduct referred to by the Act[92] has not taken all reasonable steps to exhaust his or her relevant legal remedies.[93] This will forestall overburdening the office with matters that would be better addressed by challenge proceedings or ADR.

The Public Protector determines the investigation format and procedure based on the circumstances of each case.[94] Generally, such investigation rely on: documents from various sources, media reports, related correspondences, interviews, consulting stakeholders (such as the National Treasury), legal opinions, legislation and other prescripts.[95] Witnesses may be subpoenaed to: submit affidavit or affirmed declaration, appear to testify, or to present documents.[96] It could, with warrant, also search premises and seize items that have a bearing on the investigation.[97] Anyone implicated during the investigation shall be afforded hearing and opportunity to tender evidence or examine witnesses at the investigation.[98] Advocates or attorneys may be involved in the investigative proceedings.[99]

After its investigation, the Public Protector produces and publishes the related report, containing its recommendations and the remedial actions to be taken.[100]

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[89] Public Protector Act s6(1)(a).
[90] Public Protector Act s 6(9).
[91] Section 6(9).
[92] Section 6(4) & (5).
[93] Public Protector Act s 6(3)(b).
[94] Section 7(1)(b)(i).
[95] See Public Protector (PP) *Yes We Made Mistakes* report no 1 of 2012/13 (2012) 25-28; PP *Inappropriate Moves* report no 13 of 2013/2014 (2013) 33; PP *Unsolicited Donation* report no 22 of 2013/14 (2013) 32-35; PP *Poisoned Processes* report no 20 of 2013/14 (2014) 4-7; PP *Cost of Deviation* report no 4 of 2015/16 (2016) 20-24; PP *Postponed Delivery* report no 5 of 2015/16 (2016) 25-28.
[96] Public Protector Act s 7(4)-(8).
[97] Section 7A.
[98] Section 7(9).
[99] Section 7(8) & (9)(b)(ii).
[100] SA Constitution s 182(1)(b) & (5).

c. National Prosecuting Authority

Any person may report a suspected specified offence[101] in procurement, such as corruption or fraud, to the NPA, by means of an affidavit or affirmed declaration.[102] This shall specify the nature and grounds of the suspicion and relevant information.[103] The National Director of Public Prosecution (NDPP)[104] may refer the matter to the Investigating Director or appoint an investigator to investigate the matter.[105] Also, the Investigating Director on his own initiative may investigate a suspected specified offence.[106] The procedure for investigation under the NPA is determined by the Investigating Directors based on the circumstance of each case.[107] Generally, the procedure is similar to what obtains in investigation conducted by the Public Protector, seen above.[108] However, NPA's investigative proceedings take place in camera.[109]

In practice, the NPA sometimes refers complaints of criminal conduct to the police for investigation.[110] In such instances, it supervises, directs and co-ordinates the investigations.

d. Analysis

The timeline for investigation and report by the above entities are undefined. Some procurement related investigations of the Public Protector studied lasted for a year or less; while some lasted up to seven years.[111] This factor may limit the viability of investigation and its concomitant remedy as recourse for suppliers; as the impugned procurement contract may be completed and become impracticable to reverse. However, investigation will still serve the purpose of enforcing procurement regulation notwithstanding its duration.

The National Treasury/OCPO has more opportunity of investigating procurement improprieties than the Public Protector and the NPA, since it performs procurement regulatory

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[101] See Schedule to Proclamation R123 of 1998; NPA Act ss 1("Specified Offence") & 7(1). See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* [2000] ZACC 12; 2000 (10) BCLR 1079, 2001 (1) SA 545 (CC).

[102] NPA Act s 27.

[103] Section 27.

[104] The head of the NPA: SA Constitution, s 179(1)(a).

[105] NPA Act, ss 22(3) & (4)(a)(i); 28(1)(b) & (2); 7(3).

[106] Section 28(1)(a).

[107] Section 28(4).

[108] Sections 28(6) & (8); 29. On its power of search, see: *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* [2000] ZACC 12, 2000 (10) BCLR 1079, 2001 (1) SA 545 (CC).

[109] Section 28(3).

[110] NPA *Prosecution Policy* (2013) 12 para 7.

[111] See the dates the matters were reported and concluded: PP *Cost of Deviation* 12 & 27; *Yes We Made Mistakes* 19 & 115; *Inappropriate Moves*4 & 210; *Poisoned Processes* 3 & 65.

functions.[112] Besides, the NPA will conduct investigation only where a specified offence is suspected to have been committed.[113] Specified offences in public procurement are: corruption, fraud, forgery or economic offence "of a serious and complicated nature".[114] Furthermore, the Public Protector may refuse to investigate if: (1) the matter occurred more than two years; [115] or (2) the person prejudiced by the reported improper conduct has not exhausted his legal remedies.[116] Thus, the investigative functions of the Public Protector and the NPA in relation to procurement are limited.

Nevertheless, it appears that where there is a conflict between the investigative report/findings of the Public Protector and that of any other public body, the report/findings of the Public Protector shall prevail.[117]

The Public Protector has published several reports of its investigation of public procurement on its website,[118] in accordance with its constitutional mandate;[119] whereas the National Treasury/OCPO currently does not publish such reports. Publishing the investigative reports may enhance enforcement of procurement regulations; as any stakeholder, contracting authority and supplier may rely on the findings and recommendations to take or initiate remedial actions. They also act as a guide for handling similar future matters.

Investigation of public procurement process by the Public Protector, the National Treasury and an accounting officer or authority is aimed at identifying improprieties in the process and taking remedial actions. The purpose of NPA's investigation is to determine whether to prosecute or not.[120]

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[112] PFMA s 6(2)(c); MFMA ss 5 & 6. See 3 3 2 above.

[113] Schedule to Proclamation R123 of 1998; NPA Act ss 1 & 7(1). See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* [2000] ZACC 12.

[114] Schedule to Proclamation R123 of 1998; NPA Act ss 1 & 7(1).

[115] Public Protector Act s6(9).

[116] Public Protector Act s 6(3)(b).

[117] *South African Broadcasting Corporation Soc Ltd v Democratic Alliance* [2015] ZASCA 156; [2015] 4 All SA 719 (SCA) para 52; *Democratic Alliance v South African Broadcasting Corporation SOC Ltd; Democratic Alliance v Motsoeneng* [2016] ZAWCHC 188; [2017] 2 BLLR 153 (WCC); [2017] 1 All SA 530 (WCC) para 102.

[118] Go to http://www.pprotect.org/library/investigation_report/investigation_report.asp (accessed 08/05/2017). For example: PP *Yes We Made Mistakes*; PP *Cost of Deviation* report; PP *Inappropriate Moves*; PP *Poisoned Processes*; PP *Postponed Delivery*; PP *Secure in Comfort* report no 25 of 2013/14 (2014); PP *Unsolicited Donation*; PP *Allegation of Procurement irregularities, Nepotism, Victimization and Corruption within Tshwane South College* report no 20 of 2016/2017 (2017).

[119] Constitution s 182(5); Public Protector Act s 8(1).

[120] NPA Act s 22(2)(c) & (4)(a)(i).

8 3 2 2 Remedial actions

The remedial action of the Public Protector is generally to give binding directives or recommendations to relevant authorities or persons to carry out a specific action, towards redressing the impropriety identified by its investigation.[121] It may also resolve the matter by conciliation, mediation or negotiation.[122] In some cases, the remedial actions may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow.[123] In all cases, its findings and remedial actions cannot be ignored by authorities or individuals; unless they are later set aside by a court.[124] Other governmental institutions cannot embark on a parallel investigation and claim that its investigation trumps the findings or remedial action of the Public Protector.[125] The remedial action that the Public Protector may take is extensive; only limited by the Constitution and applicable national legislation and judicial scrutiny.[126] For example, it may direct a contracting authority to cancel an improper award and conduct a fresh procurement process;[127] it may ask the National Treasury to review a contract to ascertain the market value and recover extravagant expenditure from those implicated.[128]

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[121] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11, 2016 (5) BCLR 618 (CC), 2016 (3) SA 580 (CC) paras 67 & 105(3)-(11); *South African Broadcasting Corporation Soc Ltd v Democratic Alliance* [2015] ZASCA 156; [2015] 4 All SA 719 (SCA) (SABC v DA) para 52; *Democratic Alliance v South African Broadcasting Corporation SOC Ltd (SABC); Democratic Alliance v Motsoeneng* [2016] ZAWCHC 188; [2017] 2 BLLR 153 (WCC); [2017] 1 All SA 530 (WCC) (*DA v SABC*) para 103. See *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) para 69. Before the SCA and CC settled that the remedial action of the Public Protector is binding, it was widely regarded as only persuasive: *Democratic Alliance v South African Broadcasting Corporation Ltd* 2015 (1) SA 551 (WCC) paras 50-51; Law Society of South Africa *Position Paper*: *The Extent and Limit of the Powers of the Public Protector* (2015) 5-6; P de Vos & W Freedman (eds) *South African Constitutional Law in Context* (2014) 258 & 264; M Mhango "Public Protector's Powers: What Law Says" *Sunday Independent* (21-9-2014) <http://www.iol.co.za/sundayindependent/public-protectors-powers-what-law-says-1753981> (accessed 11-11-2017); P de Vos "The Powers of the Public Protector: What the High Court Actually Found" *Daily Maverick* (26-10-2014) <https://www.dailymaverick.co.za/opinionista/2014-10-26-the-powers-of-the-public-protector-what-the-high-court-actually-found/#.WRSEu4jytPa> (accessed 11-11-2017).

[122] Public Protector Act s 6(4)(b)(i).

[123] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC para 69.

[124] Paragraphs 67, 73-75, 97.

[125] *SABC v DA* [2015] ZASCA 156 para 52; *DA v SABC* [2016] ZAWCHC 188 para 102.

[126] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC paras 66 & 71.

[127] PP *Poisoned Processes* 63-65. See also PP *Postponed Delivery* 79;

[128] PP *Inappropriate Moves* 208-210; *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11 para 10.

The Public Protector's remedial actions are quite effective. The Constitutional Court in *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly*[129] held that even the President of the Republic is bound to comply with the remedial actions of the Public Protector. It is thus one of the most invaluable constitutional gifts to South Africa in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs, including public procurement.[130] This is especially so considering that ordinary citizens can trigger the investigative powers and remedial action of the Public Protector; without cost, and technical barriers such as *locus standi*.[131]

The National Treasury makes non-binding recommendations to relevant persons or institutions in response to its investigation.[132] Nevertheless, contracting authorities would hardly ignore such recommendations,[133] as the National Treasury can withhold their funds, relying on section 216 (2) of the Constitution and section 6(2)(f) of the PFMA. In addition, the OCPO monitors implementation of such recommendations.[134]

Furthermore, the findings of the National Treasury may lead it to make binding procurement regulations or instructions.[135] But these would apply to all relevant institutions and matters, as singling out a particular matter or institution investigated would amount to legislative judgment, and thus invalid.[136]

The National Treasury could also take remedial actions as may be directed by the Public Protector; as seen above.[137]

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[129] [2016] ZACC 11paras 76-77.

[130] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11 paras 52 & 56.

[131] See *Certification of the Constitution of the Republic of South Africa*, 1996 [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para 161.

[132] *The National Treasury v Kubukeli* [2015] ZASCA 141 paras 25-26.

[133] See *The National Treasury v Kubukeli* [2015] ZASCA 141 para 11.

[134] Moloto 11-05-2016; PFMA s 6(1)(g).

[135] PFMA 76(4)(c); MFMA s 168 (1). See for example: National Treasury *Instruction Note on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management* (31-05-2011): enforced by the SCA in *Minister of Transport v Prodiba (Pty) Ltd* (20028/2014) [2015] ZASCA 38 paras 37-40.

[136] See *S v Dodo* 2001 (5) BCLR 423 (CC). See also: *Calder v. Bull* (1789) 3 Dallas U.S.S.C. 386; *Lakanmi v Attorney-General (West)* (1970) NSCC 143; W Blackstone *Commentaries on the Laws of England* vol 1 4ed (1765-1769) 44.

[137] PP *Inappropriate Moves* report 208-210; *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11 paras 10 & 105(6)-(7).

An accounting officer or accounting authority may report any conduct that may constitute an offence to the Police,[138] for further investigation. In addition, it *must* reject a contract award proposal or cancel a contract awarded to a supplier it found, relying on investigation, to have committed a corrupt or fraudulent act during that bidding process or the execution of that contract.[139] It *may*, based on its findings, reject a bid if the bidder or its director had earlier abused the institution's supply chain management (SCM) system.[140] The PPPFA Regulations 14(1)(c)(i) mandates contracting authorities to disqualify a tenderer (for that tender only) or terminate a contract where it finds that the tenderer submitted false information regarding its BBBEE status, or any other matter required in terms of the Regulations, which will affect or has affected the evaluation of a tender. In addition, the National Treasury may decide to restrict the tenderer from doing business with any organ of state for a period not exceeding 10 years.[141] The affected tenderers have the right to notice and representation before the above restrictions are imposed.[142] The measures that may be taken by any of these entities under review may involve criminal or disciplinary actions, where appropriate, as discussed below.

8 3 2 3 Prosecution and sanction

The investigative bodies above may recommend prosecution to the NPA,[143] and sanction of culprits. An example of a sanction that may be recommended is disciplinary action against the public officers indicted of procurement offences or breach. For example, the Public Protector directed the President to reprimand the Minsters involved in mishandling the Nkandla project and abusing public funds; and, the court upheld and ordered its enforcement.[144]

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[138] Treasury Regulations 16A9.1(b)(ii); Municipal SCM Regulations 38(1)(b)(ii).

[139] Treasury Regulations 16A9.1(e) & (f); Municipal SCM Regulations 38(1)(e) & (f). See Bolton *Government Procurement* 403-404; Williams-Elegbe *Fighting Corruption* 100-101.

[140] Treasury Regulations 16A9.2; Municipal SCM Regulations 38(1)(g).

[141] PPPFA Regulations 14(3).

[142] *Supersonic Tours (Pty) Ltd v State Tender Board* [2007] JOL 19891 (T); *Chairman State Tender Board v Supersonic Tours (Pty) Ltd* 2008 (6) SA 220 (SCA). PPPFA Regulations 14(1)(a)-(b) expressly requires the observance of *audi alteram partem*. See Williams-Elegbe *Fighting Corruption* 117; S Arrowsmith "Judicial Review of Public Procurement: The Recent Decisions in the National Lottery case and R v Bristol City Council ex p. DL Barrett" (2001) *PPLR* NA41.

[143] Public Protector Act s 6(4)(c)(i); SA Constitution s 179(1); NPA Act s 2; Treasury Regulations 16A9.1(b)(i).

[144] PP *Secure in Comfort* para 11.1.3; *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11 para 105(9). See *The National Treasury v Kubukeli* [2015] ZASCA 141 para 10.

Where an investigation discloses an offence, the NPA, based on a recommendation as aforementioned or on its own initiative, may prosecute those indicted.[145] The NPA may prosecute the matter in a High Court, regional court or a magistrate court.[146] The decision regarding the court in which to prosecute an accused person is determined by the complexity and seriousness of an offence, among others.[147]

Some procurement related offences and penalties prescribed by legislation include the following.

1. An accounting officer or accounting authority wilfully or in gross negligence fails to ensure that its institution maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective- liable on conviction to a fine, or to imprisonment for a period not exceeding five years.[148]

2. An accounting officer of a municipality deliberately or in gross negligence fails to take reasonable steps to implement the municipality's SCM policy; or fails to take all reasonable steps to prevent corrupt practices in the implementation of the SCM policy- liable on conviction to imprisonment for a period not exceeding five years or to a fine.[149]

3. The accounting officer of a municipal entity deliberately or in gross negligence fails to take all reasonable steps to prevent corrupt practices in the SCM system. Penalty is the same as in 2 above.[150]

4. Impeding the accounting officer of a municipality or municipal entity in implementing the body's SCM policy, or of taking all reasonable steps to ensure that proper mechanisms and separation of duties in the SCM are in place to minimise the likelihood of fraud, corruption, favouritism and unfair and irregular practices.[151] Penalty is the same as in 2 above.[152]

5. Offences in respect of corrupt activities relating to contracts and procurement, under sections 12 and 13 of the Corruption Act.[153] Penalty include either a fine; or imprisonment up

[145] NPA Act s 20.
[146] See NPA Act ss 22(9), 24(2)(a); Prevention and Combating of Corrupt Activities Act 12 of 2004 (Corruption Act) s 26(1); NPA *Prosecution Policy* 5(A).
[147] NPA *Prosecution Policy* 5(A).
[148] PFMA ss 38(1)(a)(iii), 51(1)(a)(iii), 86.
[149] MFMA ss 173(1)(a)(ii) & (iv)(bb) 174.
[150] Section 174.
[151] MFMA ss 115(2), 173(5)(e).
[152] Section 174.
[153] See also offence under s 17.

to life (High Court); imprisonment for a period not exceeding eighteen years (regional court); imprisonment for a period not exceeding five years (magistrate court). In addition, the court may order that the following be endorsed on the Register kept within the National Treasury:[154]

- the particulars of the convicted person/enterprise;
- the particulars of any of the enterprise's or its subsidiary's partner, manager, director or other person, who wholly or partly exercises or may exercise control over that enterprise and who was involved in the offence concerned or who knows or ought reasonably to have known or suspected that the enterprise committed the offence;
- the conviction, sentence, and any consequential order(s) of court.

Where the Register has been endorsed, the National Treasury may: (1) terminate any agreement with the person or enterprise; (2) recover from them damages incurred by the State from the tender process or the conclusion of the agreement or for having to make less favourable alternative arrangements; (3) debar or disqualify them from participating in all South African government contracts for a period determined by the National Treasury (may not be less than five years or more than 10 years).[155] The National Treasury may at any time vary or rescind any of the above sanction/restriction it imposed; and it must delete such particulars from the register when the stipulated period expires.[156] It must, within fourteen days of imposing the restriction or revising such, notify the culprit, the contracting authority and all government departments of that decision; and request all those institutions to comply.[157] The court may review such restriction as imposed or revised.[158]

8 3 3 Analysis

It is apparent from the above that two forms of debarment operate in Nigeria and South Africa. One is imposed as a penalty following a conviction; the other constitutes a remedial action following investigative findings by a regulatory body or procuring entity. Triggering the latter is a more viable secondary remedy for a bidder than the former; as the former also involves a prosecuting authority and the court, with the attendant uncertainties and delays. Debarment attempts to keep offenders out of a public procurement system. Thus, it supports the integrity

[154] Corruption Act ss 28(1) & (7); 29. Available at <http://www.treasury.gov.za/publications/other/Register%20for%20Tender%20Defaulters.pdf > (accessed 23/05/2017)

[155] Section 28(3), (5); Treasury Regulations 16A9.1(c). See Bolton *Government Procurement* 388-402

[156] Corruption Act s 28(4).

[157] Section 28(5).

[158] Section 28(3)(b); *Red Ant (Pty) Ltd v Mogale City Municipality* (16813/2012) [2013] ZAGPJHC 301 para 34.

of the system.[159] It constitutes a remedy for responsible suppliers, as it enhances fair competition and opportunity to secure government contracts. It also acts as deterrence to procurement abuses owing to its detrimental impact on the culprits.[160]

It is advantageous that, in both jurisdictions, practically no deadline applies to the triggering and conducting of investigations,[161] which are precursors to debarment and other remedial actions. Consequently, a bidder who failed to secure a review remedy or to institute a review within time may resort to triggering investigation, with a hope of securing available remedial action.

On the other hand, the absence of a deadline for concluding investigation and taking remedial action is a drawback; as the affected contract may be partially or fully completed before the investigation is finalized. This may make it impracticable for the contract to be cancelled. Nevertheless, offences related to the procurement or contract could still be prosecuted.

Also, an investigative finding which discloses fraud in a contract award may entitle an aggrieved bidder to sue for damages for loss suffered owing to the award.[162]

Investigating or recommending investigation is within the discretion of relevant authorities;[163] thus, a party's right to trigger it is limited. Where the authorities exercise their discretion bona fide and rationally to refuse investigation, they may not be compelled to investigate.[164] However, once an investigation discloses a contravention, it becomes incumbent on that authority to take remedial actions.[165]

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[159] See Williams-Elegbe *Fighting Corruption* 34.

[160] See Williams-Elegbe *Fighting Corruption* 34; S Arrowsmith, H-J Priess & P Friton "Self-Cleaning- An Emerging Concept in EC Procurement Law?" in H Punder, H-J Priess & S Arrowsmith *Self-Cleaning in Public Procurement Law* (2009); R Kramer "Awarding Contracts to Suspended and Debarred Firms: Are Stricter Rules Necessary?" (2005) 34(3) *PCLJ* 539 543.

[161] Note that the Public Protector Act s 6(9) gives the Public Protector the discretion to entertain a matter reported two years after the occurrence of the incident.

[162] See *Minister of Finance v Gore NO* [2006] SCA 97 (RSA) paras 1-11 & 91.

[163] Nigeria: PPA s 53(1); SA: PP Act s 6(3), (4)(b), (c) & (d); NPA Act s 28(1)(a); PFMA s 6(2)(e).

[164] Nigeria: See *Fawehinmi v Akilu* (1987) 2 NSCC 1265; *Gani Fawehinmi v Inspector-General of Police* [2002] 7 NWLR (pt 767) 606. SA: *M & G Media Limited v Public Protector* [2009] ZAGPPHC 98, [2010] 1 All SA 32 (GNP) paras 100-101; *Pharmaceutical Manufacturers Association of SA: In re: Ex parte President of the Republic of South Africa* 2000(2) SA 674 (CC) paras 83-86; *S v Makwanyane* [1995] ZACC 3, [1995 (3) SA 391 (CC); *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003(6) SA 407 (SCA) 409J-410A. See also *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642 651; *R v Northumberland Quarter Sessions ex p. Williamson* (1965) 2 All ER 87, (1965) 1 WLR 700; *Re: Fletcher's Application* (1970) 2 All ER 57

[165] Nigeria: PPA s 53(4); SA: Constitution ss 182(1)(c); 216(2).

The remedial actions that the Nigerian BPP, and the South African Public Protector and National Treasury may take are extensive. However, the BPP generally does not conduct investigation on its own, but refers it to a *relevant authority*; unlike the two South African authorities that could investigate and also take remedial actions. It has been argued that the Public Protector exercising power to investigate and take binding remedial actions violates separation of powers.[166] It is submitted that it does not: as the powers are vested by the Constitution; its actions are subject to judicial review; it is not a branch of government and its powers are limited within the narrow confines of its statutory duties.

8 4 Audit

Background information on audit and relevant audit institutions in Nigeria and South Africa that relate to public procurement was presented in chapter 3.[167] This section focuses on audit as a secondary enforcement mechanism in these public procurement systems.

Audit is a form of investigation, as it is a formal examination of an entity's accounting records, financial situation, or compliance with some other set of standards.[168] Its outcome is a report of findings and non-binding recommendations/opinions, usually addressed to legislative and oversight bodies; and also published.[169] However, it differs from the investigation discussed above,[170] as public-sector audit is generally done on regular basis by the audit institutions;[171] hence, does not depend on complaints or suspicion of irregularity to be triggered. It is aimed at determining whether public-sector entities and public servants perform their functions effectively, efficiently, ethically and in accordance with the applicable laws and regulations.[172] Unlike ordinary investigation, it is not primarily focused on detecting or confirming particular suspected breaches or offences, for the purposes of imposing sanctions.

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[166] Mhango *Sunday Independent* (21-09-2014). On Separation of Powers in South Africa, see *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC) 298; *South African Association of Personal Injury Lawyers v Heath* 2001 (1) BCLR 77 (CC) para 22-23; *S v Dodo* 2001 (5) BCLR 423 (CC); PM Mojapelo "The doctrine of separation of powers (a South African perspective)" (2013) 26 *Advocate* 37-46 <www.sabar.co.za/law-journals/2013/april/2013-april-vol026-no1-pp37-46.pdf> (accessed 11-11-2017).

[167] 3 3 3 3.

[168] See Garner *Black's Law Dictionary* 150; INTOSAI *ISSAI 100 – Fundamental Principles of Public-sector Auditing* (2013) 3.

[169] Nigeria: PPA s5(p); CFRN s 85(2) & (5); SA: Constitution s 188(3); PAA ss 4, 20, 21, 28.

[170] 8 3.

[171] Nigeria: PPA s 5(p); CFRN s 85 (5). SA: Constitution s 188(3); Quist et al *Public Expenditure* 23.

[172] INTOSAI *ISSAI 100* 4.

Nevertheless, a complaint or request to the relevant audit institutions concerning an alleged procurement irregularity may instigate them to audit a procuring entity or the procurement process concerned.[173] Such complaint or request is usually made by public entities. There is no legal barrier against a private person, such as an aggrieved supplier, to make such complaint or request. This option is unlikely though; considering that there are more accessible and effective options to address such grievances, including triggering investigation as in 8 3 above.

An audit report/finding could be relied upon by a bidder to institute administrative or legal action; for example, to claim damages where the report has detected fraud in the procurement process.[174] Also, the court could rely on audit reports in drawing up remedies.[175] Furthermore, audit reports could lead to formulation or review of policies and legislation that may support the integrity of the procurement system.

A limitation of audit is that it is generally undertaken after the procurement process and the contract are completed. Thus, it is not a remedy route for an aggrieved bidder that wishes to have a contract cancelled or set aside and re-awarded; as it may have become impracticable to do so.[176] Besides, audit recommendations are not binding.

8 5 CSOs action

In chapter 3,[177] the role of CSOs in the enforcement of public procurement regulations in Nigeria and South Africa was discussed. In summary, the actions they may take to support enforcement include: acting as observers in procurement processes; whistle blowing on identified procurement breaches/infractions (through media exposure); reporting or complaining to law enforcement or investigative authorities; and acting as amicus curiae in procurement related litigations.[178] These CSOs' actions support the integrity of the public procurement system, as they can push for and possibly obtain remedial actions against

[173] See SA PAA s 5(1)(d).

[174] See *Gore v Minister of Finance* (11190/99) [2008] ZAGPHC 338; *Minister of Finance v Gore NO* [2006] SCA 97 (RSA) paras 9-11, which relied on the investigation report of the Office for Serious Economic Offences under the NPA.

[175] See the SA case: *Black Sash Trust v Minister of Social Development* [2017] ZACC 20; 2017 (9) BCLR 1089 (CC) para 76(12).

[176] *Chairperson - Standing Tender committee v JFE Sapela Electronics* [2005] 4 ALL SA 487 (SCA) paras 26-29; *Sebeza Kahle Trade v Emalahleni Local Municipal Council* [2003] 2 ALL SA 340 (T) 348. See also *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) para 1265F-H. See Quinot *PPLR* (2011) 198.

[177] 3 3 3 6.

[178] See 3 3 3 6 above for examples.

infractions that suppliers or government may overlook or fail to identity.[179] Aggrieved bidders may actually instigate CSOs to take the above actions by passing relevant information to them or supporting their cause in other ways. This may be a viable option for bidders or suppliers who do not wish to be at the forefront of the controversy for various reasons; such as protecting their commercial relationship with the procuring entity and fellow suppliers.

8 6 Conclusion and analysis

Except for ADR, the secondary mechanisms involve the engagement and corporation of public institutions; which may not always be forthcoming. Nevertheless, as seen in this chapter, these mechanisms may occasionally be the preferred or only option for redressing breaches or enforcing procurement regulations.

ADR (specifically negotiation or mediation) could effectively resolve disputes where an organ of government engages another organ for the procurement of goods and services; as the process accords with routine inter-governmental relations. This is even more so for South Africa, considering that ADR is given statutory recognition by section 44 of the MFMA; and it aligns with the constitutional principle of cooperative government and friendly intergovernmental relations.[180] The tendency for unwholesome compromise in ADR could be minimal in such intergovernmental disputes, compared to when private-interest-driven and intensely profit-seeking contractors are involved. Also, confidentiality of communication that ADR entails is arguably more acceptable in intra-governmental procurement dispute than when contractors are involved. Notwithstanding, comprehensive records of such intergovernmental ADR proceeding should be kept and made accessible to interested members of the public, including suppliers, in accordance with Nigerian FOIA and South African PAIA, to ensure transparency.

Investigation, and concomitant remedial action or sanctions, are effective where there is reasonable suspicion of procurement-related offences, such as fraud, forgery or corruption; since bidder remedies cannot effectively address this criminal aspect of procurement law violation. Bidder remedies involves civil proceedings, and aggrieved bidders would be more interested in remedying their injury or the disadvantage caused by a procurement breach, than pursuing investigation and related remedial action or sanctions against the violators. Bidders

[179] See generally Udeh "Social Accountability Mechanisms" in *Public Procurement Reform* 235; C Ekwekwuo & SN Nyeck "The Role of New Technologies of Communication and Social Audits in Procurement Monitoring" in SN Nyeck *Public Procurement Reform and Governance in Africa* (2016) 261.

[180] SA Constitution s 41(1)(h).

or suppliers would normally regard this form of enforcement of procurement law as the very last resort; usually where bidder remedies failed, or can no longer be invoked owing to the expiration of the commencement time. In most cases studied, it was CSOs or relevant governmental authorities that triggered or initiated investigation into violation of procurement law; some of which resulted in remedial actions or sanctions, or prosecution.[181] In South Africa, the role of CSOs, political parties, or their members, in this regard is becoming increasingly significant. The investigative institution that they usually petition is the Public Protector; apparently owing to its independence, proven neutrality, effectiveness, and far reaching powers. Following the judgment of the Constitutional Court, in *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly*,[182] that the remedial actions or directives of the Public Protector are binding, the frequency with which procurement-related petitions may be presented to this institution would likely increase. Nigeria may consider establishing a body, or empowering an existing one, with status and power similar to the Public Protector of South Africa, to investigate or handle specific procurement-related petitions. This is considering allegations of corrupt practices in the BPP.[183] The Nigeria Public Complaints Commission is an ombudsman,[184] but lacks the status and power, and the resultant effectiveness enjoyed by the Public Protector; as the Commission can only investigate complaint against administrative actions, and make non-binding recommendations.[185]

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[181] Nigeria: see generally Udeh "Social Accountability Mechanisms" in *Public Procurement Reform* 235; Ekwekwuo &Nyeck "Social Audits in Procurement Monitoring" in *Public Procurement Reform* 261; News Express "Group Petitions BPP, Seeks Investigation of CCB's Proposal for Purchase of Secretariat" *News Express* (22-08-2016) < http://www.newsexpressngr.com/news/27416-Group-petitions-BPP-seeks-investigation-of-CCBs-proposal-for-purchase-of-secretariat> (accessed 11-11-2017). South Africa: *The National Treasury v Kubukeli* [2015] ZASCA 141, [2016] 1 All SA 30 (SCA), 2016 (2) SA 507 (SCA) paras 1-2; PP *Inappropriate Moves* report no 13 of 2013/2014 (2013) 4; PP *Poisoned Processes* report no 20 of 2013/14 (2014) 3; PP *Postponed Delivery* report no 5 of 2015/16 (2016) 3; PP *Secure in Comfort* report no 25 of 2013/14 (2014) 5; *Yes We Made Mistakes* report no 1 of 2012/13 (2012) 5; PP *Unsolicited Donation* report no 22 of 2013/14 (2013) 14.

[182] [2016] ZACC, 2016 (5) BCLR 618 (CC), 2016 (3) SA 580 (CC) 11 paras 67 & 105(3)-(11). See *South African Broadcasting Corporation Soc Ltd v Democratic Alliance* [2015] ZASCA 156; [2015] 4 All SA 719 (SCA) (SABC v DA) para 52; *Democratic Alliance v South African Broadcasting Corporation SOC Ltd (SABC); Democratic Alliance v Motsoeneng* [2016] ZAWCHC 188; [2017] 2 BLLR 153 (WCC); [2017] 1 All SA 530 (WCC) (*DA v SABC*) para 103.

[183] See H Umoru "Senate probes alleged corruption in BPP" *Vanguard*; Punch "Reps to probe BPP over indiscriminate issuance of certificate" *Punch*.

[184] By virtue of Public Complaints Commission Act CAP P37 LFN 2004.

[185] Public Complaints Commission Act ss 5 & 7.

Although procurement audit is routine and may not be as prominent as bidder remedies and other secondary remedies in redressing breaches in public procurement, its relevance lies more in detecting and suggesting redress against institutional lapses which encourage these breaches or corruption. This role would hardly be played by any other mechanism under review; and, it would always remain relevant to the integrity and effectiveness of public procurement systems.

The overall effectiveness of the Nigerian and South African procurement enforcement mechanisms is assessed in the next (last) chapter.

Chapter 9

General Conclusion: Improving Effectiveness and Design of Systems

9 1 Outline

Having looked at the various aspects of the bidder remedies systems of Nigeria and South Africa, in addition to the secondary remedies and enforcement mechanisms, this chapter draws some conclusions on the overall effectiveness of these systems. It further presents practical recommendations on improving the effectiveness of each system; which partly includes transposing the good practices and rules in one into the other. It is aimed at guiding stakeholders[1] within the jurisdictions to maximize the potential of the systems. The later part goes beyond the two systems to present a blueprint for designing a bidder remedies system, with focus on procurement systems in Africa. This will be partly based on findings from studying the two systems. Lastly, the concluding remarks identify the study's key finding and the areas of further study on the subject-matter; and present general comments on remedies in public procurement that are relevant beyond the systems studied and the African systems.

9 2 Effectiveness of the Systems

The remaining elements of effectiveness, for which the systems had not been assessed, relate to:

(1) whether the objectives of the systems and the interests involved are balanced; and

(2) whether the disadvantages of the challenge mechanisms are minimal.

The assessment is left for this stage[2] since it entails drawing conclusions from all aspects of the systems. It also requires a summation on the extent to which the systems conform to the other elements of effectiveness.[3]

[1] These include: suppliers, public entities, law enforcement agencies, court, legislative authorities, lawyers, and CSOs.

[2] 9 2 2 below.

[3] Listed in 2 4 3 above.

9 2 1 Assessment summary

Nigeria and South Africa regulate public procurement and have bidder remedies and other mechanisms of enforcement.[4] The bidder remedies systems of both countries are reasonably effective,[5] although this is undermined by certain legal factors.

Nigeria's PPA, section 54, grants bidders a general right to challenge acts or decisions of procuring entities, by sequential administrative and judicial review before hierarchical forums.[6] It is arguable that a potential bidder who was excluded from bidding also has a right to challenge.[7] Similarly, the South African Constitution, section 33(1), and PAJA, confers a general right of challenge on actual and potential bidders against public procurement decisions that are unlawful, unreasonable and procedurally unfair; as public procurement is regarded as an administrative action.[8] Bidders may opt for administrative or judicial review before the relevant forums; except the matter relates to a municipal procurement, which requires exhaustion of the internal appeal under section 62(1) of the Systems Act.[9] The scope of right to procurement remedies in Nigeria and South Africa meets and, in certain respects, goes beyond the UNCITRAL Model Law, article 64(1), which affords actual and potential bidders the right to challenge alleged non-compliance of the decision or action of a procuring entity with the provisions of the law. Whereas article 64(1) requires the bidder to prove that it suffered or may suffer loss or injury because of the alleged breach; section 54 of the Nigerian PPA only requires proof of the breach. The Nigerian PPA thus enlarges the reviewability of procurement decisions beyond the scope prescribed by the Model Law. Also, the South African Constitution[10] permits persons other than bidders/contractors, such as persons acting in public interest or group or class interest, to institute judicial review against procurement decisions or actions.[11] So South African CSOs and political parties or their members have successfully

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[4] As seen chapters in chapters 3-8.
[5] Identified below in italics.
[6] Discussed in chapters 5-7.
[7] See 5 3 5 1 above.
[8] See 4 3 2 2 1. Also, Quinot (2011) *PPLR* 192, 195; Quinot *State Commercial Activity* 162; *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* 1997 2 All SA 548 (SCA); *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA); *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province* [2007] ZASCA 165; 2008 (2) SA 481 (SCA) para 4.
[9] Discussed in chapters 5-7.
[10] Sections 33, 34; also, PAJA ss 1(1) & 6(1). See 7 5 2 above.
[11] Quinot (2011) *PPLR* 192, 195; Quinot *State Commercial Activity* 162. See also *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* 1997 2 All SA 548 (SCA); *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA); *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province* [2007] ZASCA 165; 2008 (2) SA 481 (SCA) para 4

instituted judicial review to challenge pubic procurement decisions,[12] or applied for and acted as amicus curiae in procurement review cases.[13] Thus, the Nigerian and South African remedies systems focus on pre-empting or correcting or reversing improper administrative actions and entrenching the rule of law, beyond affording administrative justice to a prejudiced party, which arguably is the focus of article 64 of UNCITRAL Model Law. However, the disadvantage of enlarging the scope of review right as obtainable in Nigeria and South Africa is that it also enlarges the potential for disruption to procurement proceeding and contract.

In both jurisdictions, essentially no procurement matter is exempted from review and the forums' decisions are binding.[14] However, South African courts' interpretation of section 62(3) of the Systems Act effectively exempts unconditional award or concluded contracts from the internal appeal under the Act.[15] This interpretation is contestable and limits the effectiveness of that internal review mechanism.[16] However, an unconditional award or concluded contract that escapes the review under section 62(3) of the Systems Act could be challenged under judicial review. Thus, all aspects of both public procurement systems are still open to the law-enforcement role of suppliers.[17] Not exempting any public procurement decision from review is in consonance with the current Model Law;[18] which improved upon the 1994 Model Law that exempted certain matters from challenge.[19] Since concluded contracts are reviewable in both jurisdictions, it obviates the need to provide for a standstill period after notification of award, as the standstill is to forestall execution of contract to foreclose review. However, the approach of the UNCITRAL Model Law, which provides for standstill in article 22(2) notwithstanding that it permits review of concluded contracts, is preferable. The reason is that standstill allows any challenge to the proposed award to be dealt with before the

[12] Examples: *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11; *Black Sash Trust v Minister of Social Development* 2017] ZACC 8, 2017 (5) BCLR 543 (CC), 2017 (3) SA 335 (CC).

[13] See *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2015] ZACC 7;

[14] See 2 3 2 3 (ii); 4 3 2 and 5 3 3 above.

[15] *Loghdey v City of Cape Town* [2010] ZAWCHC 25 para 33; *Loghdey v Advanced Parking Solutions* CC 2009 (5) SA 595 (C); *Lohan Civil-Tebogo Joint Venture v Mangaung Plaaslike Munisipaliteit* 508/2009 (O) [2009] ZAFSHC 21; *City of Cape Town v Reader* (719/2007) [2008] ZASCA 130, 2009 (1) SA 555 (SCA) paras 25, 31. See Quinot, (2011) PPLR 197.

[16] See 5 3 3 above and 9 3 2 below.

[17] See 2 3 2 3 (ii).

[18] Guide to Enactment 82 & 230.

[19] Article 52(2): which included: procurement method, concluded contract. See Myers (1994) *IBL* 253 255.

additional complications and costs of addressing an executed contract arise.[20] In addition, procurement review would be impracticable and foreclosed where the contract is nearly-fully or fully performed; even if there were irregularities or unlawfulness in the procurement process.[21]

Nigeria's sequential internal and external administrative review mechanism, with effective remedies, which must be exhausted before recourse to the court, is advantageous. It substantially obviates the recourse to court. In addition, the timeframe for completing the administrative reviews are short,[22] thus the intervention is speedy. This consequently minimizes the disruption of the procurement process, which *a suspension order* (available to all the forums) could cause. The reverse is the case for South African administrative review. It is not coherent, and the remedies are largely ineffective.[23] However, this has led to a robust judicial intervention in South African public procurement; which has enriched its related jurisprudence, more than is obtainable in Nigeria. Nevertheless, the frequency of procurement cases unnecessarily increases the courts' workload. How this may be curbed is discussed below.[24] The element of effectiveness requiring a body to hear a challenge as a first step and a further body to hear an appeal as a second step, is met by the sequential administrative and judicial review mechanisms of Nigeria; and by the effective judicial review jurisdiction of the South African High Court whose review decisions are appealable to the higher courts (apart from the instances where available administrative mechanisms are effective). The above scenarios align with the UNCITRAL Model Law, which presents the options of administrative and judicial recourse mechanisms,[25] but is more interested in systems providing for a body to hear a procurement challenge at first instance and another body to entertain an appeal or review of the first challenge decision.[26]

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[20] Guide to Enactment to Model Law 232 para 20.

[21] See SA: *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* [2005] ZASCA 90, 2008 (2) SA 638 (SCA), [2005] 4 All SA 487 (SCA) paras 25, 27-30; *Aurobindo Pharma (Pty) Ltd v Chairperson, State Tender Board* [2010] ZAGPPHC 51 para 7; *Sebenza Kahle Trade CC v Emalahleni Local Municipal Council & Another* [2003] 2 All SA 340 (T). Nigeria: *Badejo v Federal Ministry of Education* (1996) 8 NWLR (part 464) 15 40-41; *Ogbonna v President Federal Republic of Nigeria* (1997) 5 NWLR (Pt 504) 281 187.

[22] PPA s 54(2)-(6).

[23] See 5 4 and 6 11 2 above.

[24] 9 3 2.

[25] Articles 64-67; Guide to Enactment 230-231 paras 9-14.

[26] Article 64(2) & (3); Guide to Enactment 230-231 paras 9-14.

Nigerian PPA[27] and the FOIA[28] collectively grant access to procurement records within seven days of request, or fourteen days when circumstances warrant. The South African Constitution[29] and the PAIA[30] together grant access to procurement records within 30 days of request, extendable by another 30 days. In addition, Rule 53(1)(a) and (3) of the Uniform Rules of Court creates a mechanism for an applicant for judicial review of a public procurement decision or proceeding, at the High Court, to obtain access to all records of the procurement. Access to records facilitate exercise of review right, as parties rely on procurement records to identify contravention and prove their cases. The response time of Nigeria aligns with the global average (fifteen days);[31] while that of South Africa does not, however, the mechanism under Rule 53(1)(a) and (3) may be effectively used to obtain, within fifteen days of service of notice of motion, the relevant records of the decision or process sought to be reviewed. The stipulation by Nigerian and South African legislation of specific timeframe for responding to request for records is preferred to the approach of the UNCITRAL Model Law, article 25(2) and (3), that only provides for grant of access to records without provising a definite timeframe. A definite timeframe imposes an obligation on the body concerned to grant access within the deadline; thus, enhancing its responsiveness. Where request for information is not granted promptly or within the days stipulated by law, the applicant may request the suspension of the challenged procurement proceeding or the restraining of the entity from taking an action. Besides, concluded contracts are reviewable.

Suspension or restraining orders are usually granted expeditiously by the administrative or judicial forum. Thus, they generally intervene without delay on interim basis. However, final determination of case at the judicial review stage in Nigeria, and at both administrative and judicial review stages in South Africa, do not proceed swiftly within a reasonably short period in the normal course. Nevertheless, if at the end, breach or irregularity in procurement is proved, the aggrieved bidder may be granted any of the various available remedies, including setting aside of contract and ordering the re-tendering or re-evaluation. Where circumstances warrant, the forum could order that the contract be awarded to the aggrieved bidder. Courts in both jurisdictions have power to award damages. However, for South Africa, it is only available

[27] Sections 16(14), 38(1) & (2).
[28] Sections 4 & 6.
[29] section 32.
[30] Sections 25 & 26.
[31] Open Society Institute *Transparency & Silence* 176.

where the procurement process is tainted with fraud and the party suffered consequential loss.[32] Review decisions in both jurisdictions are easily enforced by a fast and simple mechanism; such as contempt proceeding when court orders are disobeyed.[33]

Beyond bidder remedies, the Nigerian and South African systems provide other mechanisms (such as ADR, in limited cases; investigation, administrative remedial action, or sanctions; and audit), to redress infractions in procurement and enforce procurement law. Investigation and audit, and the concomitant administrative remedial action or prosecution and sanction, are more effective for handling criminal aspects of procurement law violation and addressing institutional lapses which encourage breaches or corruption. These mechanisms are not covered by the Model Law; but are important for African procurement systems still grappling with integrity concerns.[34]

9 2 2 Concluding assessment

Striking a balance between the sometimes-competing objectives of the remedies system and the various interests involved makes the system sustainable.[35] Also, the disadvantages of the regime would have to be minimal to be viable.

9 2 2 1 Balancing the objectives and interests

The objectives of the remedies system include protecting the rights of bidders, and ensuring the integrity of the procurement system.[36] The parties whose interests may be affected by a procurement review decision include: the challenging bidder, the successful bidder, other bidders, the procuring entity/government, and the public.

The binding nature and ease of enforcing review decisions in Nigeria and South Africa support both objectives and the interests concerned. The available remedies such as interim suspension of procurement proceedings, set aside of wrongful award or contract, and order to re-evaluate bids, afford aggrieved bidders opportunity to re-compete fairly and probably win

[32] See 7 9 above.
[33] See 5 3 9; 6 8; and 7 9 3 above.
[34] See Quinot "Supplier Remedies" in *Procurement regulation* 308; World Bank Institute (WBI) *Contract Monitoring Initiative* http://wbi.worldbank.org/wbi/content/transparent-contracting-and-procurement (accessed 12-11-2017); Odhiambo & Kamau (2003) *OECD Development Centre: Working Paper No 208*; OECD *Enhancing Integrity in Public Procurement*; and most of the Country Procurement Assessment Reviews on African countries conducted by the World Bank; Asare et al "Trends in Public Procurement in Africa"; Hunja "Obstacles to Public Procurement Reform" in *Public Procurement* 13-22.
[35] Gordon (2011) *PCLJ* 432; Quinot "Supplier Remedies" in *Public Procurement* 309.
[36] See 5 2 1 above; Quinot "Supplier Remedies" in *Public Procurement* 308.

contracts. Bidders' rights are thus protected. On the other hand, the availability of these measures leads to respect of the procurement rules and integrity of the systems. It presumably deters actors from committing procurement infractions, since they know that such actions may lead to a review, with the attendant adverse consequences. However, the automatic suspension of procurement proceedings during external administrative review in Nigeria does not permit consideration of factors that could warrant the refusal or lifting of suspension; such as urgent public interest. However, this is ameliorated by the brevity of the review timeframe.[37] Nonetheless, the approach of the UNCITRAL Model Law in this regard is preferable, as it grants discretion to the review authority to order suspension of the procurement proceeding or contract, or to refrain from ordering it if urgent public interest considerations require the procurement proceedings or contract to proceed.[38] Restricting award of damages to where procurement decisions are tainted with fraud or corruption strikes a balance between compensating the loss suffered by aggrieved bidders as a result of criminal acts of public officers, and saving public funds in other instances.

Courts in both jurisdictions exercise restraint when considering applications to interfere with the administrative (procurement) decisions of public entities. They accord appropriate deference to the lawful decisions and interests legitimately pursued by administrative agencies, based on the constitutional principle of separation of powers.[39] This deference is shaped by courts carefully weighing not only the need for judicial intervention, but also its consequences. Judicial recourse in both jurisdictions, being in the form of judicial review, limits the interference of courts in the decisions of procuring entities. While the courts can intervene to protect the rights of bidders to fair and lawful procurement decisions; it does not usurp the bid evaluation and award functions of procuring entities.[40] Also, not every slip in the procurement process necessarily attracts judicial sanction.[41] Even where there is an infraction in a

[37] PPA 54(6). See 6 7 1 above.

[38] Article 67(3) & (4).

[39] See PJH Maree & G Quinot "A Decade and a Half of Deference Part 1" (2016) 2 *TSAR* 268; PJH Maree & G Quinot "A Decade and a Half of Deference Part 2" (2016) 3 *TSAR* 447; Dyzenhaus "The Politics of Deference: Judicial Review and Democracy" in M Taggart (ed) *The Province of Administrative Law* (1997) 279 303; C Hoexter (2000) *SA Law Journal* 484 501-2. See *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA) para 21; *Balarabe Musa v Auta Hamza* (1982) 3 NCLR 229 257.

[40] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 45.

[41] *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* [2010] ZASCA 13, 2010 (4) SA 359 (SCA) para [21]; *South African National Road Agency Ltd v The Toll Collect Consortium* [2013] 4 All SA 393(SCA); 2013 (6) SA 356(SCA) para 16; *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v CEO SASSA* [2013] ZASCA 29; 2013 (4) SA 557 (SCA) para 21; *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA) para 17.

procurement process the court may refuse to set aside the related contract if it is nearly or fully completed. It considers the public interest served by the project, and that the innocent contractor ought to be paid for the completed work.[42]

The power of Nigeria's BPP and South African Treasury to terminate procurement contracts based on a finding or conviction for procurement infraction or corruption protects the integrity of the procurement system. However, they consider certain factors and interests before exercising the power. These include: the duration of the contract and the extent to which it has been executed, the urgency of the services involved; and whether the termination would cause extreme cost.[43] Such consideration balances the pursuit of policy objectives and the interests that may be affected by the termination.

9 2 2 2 Disadvantages are minimal

The disadvantages that may arise from a bidder remedies system include: disruption and delay to procurement process or contract; over-compliance by procuring entities owing to fear of challenge, leading to bureaucratic bottleneck; inappropriate compromise between parties to dispute; and, loss of public funds on damages or compensation and litigation cost.[44]

In Nigeria, the disruption caused by bidder remedies is relatively minimal. This is owing to the following factors:

- *locus standi* is limited to actual and potential bidders;
- the two-tier administrative review mechanisms are effective and expeditious; and,
- administrative review must be exhausted before judicial recourse.[45]

Consequently, only a few procurement cases get to judicial review;[46] where disruption to procurement could be substantial, owing to lengthy proceedings and possible appeal.

The disruption that may be caused by the South African bidder remedies system is quite substantial. This is owing to:

- largely ineffective and incoherent administrative review mechanisms;

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[42] See *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) paras 26-29; *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* [2010] ZASCA 13, 2010 (4) SA 359 (SCA) para 15; *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) para 23..

[43] Corruption Act s 28(3)(a)(i); William-Elegbe *Fighting Corruption* 224.

[44] See Zhang (2007) *PPLR* 332-339; Marshall et al (1994) *Rand Journal of Economics* 297-317; Pachnou *Effectiveness of Bidder Remedies* 378-379, 410; Arrowsmith *Public and Utilities Procurement* 1435; Pachnou (2005) 5 *PPLR* 256 262-263; Arrowsmith *Judicial Review* 305; Arrowsmith *Regulating Public Procurement* 774.

[45] PPA s 54(2), (3) & (6). See chs 5 & 6.

[46] See 6 11 1 above.

- the fact that the administrative review options may not be exhausted before judicial recourse (except for the internal appeal under the Systems Act);
- the numerous procurement cases that go to court;
- no defined time for administrative and judicial review proceedings;
- the resultant lengthy judicial proceedings;
- generous judicial review grounds;
- multiple appeal opportunities; and,
- the possibility to review and set aside even partially completed contracts.[47]

It is arguable that procuring entities in both jurisdictions hardly indulge in over-compliance with procurement rules owing to fear of challenge. Over-compliance is where procuring entities, for the fear of procurement challenge or to prevent such challenge, make unnecessary efforts towards complying with the procurement rules, and fail to exercise their lawfully allowable discretion, leading to avoidable delay and bottleneck in the procurement system. The following are factors that make over-compliance virtually non-existent in both jurisdiction. First, cost of litigation in both jurisdictions is relatively high and could deter litigation.[48] Secondly, it is not often that winning a challenge translates to winning the bid concerned. As a result, bidders would be circumspect about instituting challenge proceedings. Thirdly, the fact that public servants are not personally liable for procurement breaches, except for punishable infractions, may make them only reasonably cautious about complying with procurement rules.

Inappropriate compromise between parties to dispute is likely to occur where ADR is used, as discussed above.[49] How to avert this is suggested in 9 3 below. Such compromise would be minimal where an independent adjudicatory authority and other bidders are involved; which is largely the case under administrative (external) and judicial review in both jurisdictions.

As seen above,[50] damages for loss suffered by bidders as a result of a challenged procurement process is limited to where the process is tainted with fraud or corruption. Hence, compensation or damages is hardly awarded. Litigation cost is relatively high; but public

[47] Discussed in chs 5-7.
[48] Quinot (2011) *PPLR* 207; Quinot "Supplier Remedies" in *Public Procurement Regulation* 313-314; Penal Reform International *Access to justice in Sub Saharan Africa* 17
[49] 8 2 3.
[50] 7 9 1 3 & 7 9 2 3.

attorneys or state counsel usually handle such litigation on behalf of government with no fees paid.[51] Thus, the public fund that may be spent in response to procurement review is minimal.

On the whole, the disadvantages of the bidder remedies systems do not surpass the benefits.

Nevertheless, certain aspects of the systems require reform to improve their effectiveness.

9 3 Improving effectiveness of the Systems

9 3 1 Nigeria

1. The internal review mechanism is effective; but there is a likelihood of bias, as seen in chapter 5. To tone down the bias and enhance the acceptability of the review decision, the accounting officer could incorporate negotiation or mediation during the review.[52] The BPP could make regulations in this regard.[53] This may reduce the likelihood of procurement cases going on further review. Thus, it will curtail disruption of the procurement process or contract, save cost and reduce review burden on the BPP and courts.

2. To reduce the likelihood of unacceptable compromises, especially where ADR is incorporated, and to enhance transparency, the BPP should make regulations mandating the authorities concerned to:

- keep records of the internal and external review proceedings;
- electronically share all internal review decisions and records of proceedings with the BPP;
- publish the records and the review decisions on the website of the procuring entities or the BPP; and,
- hold debriefing meeting on the proceedings with bidders, on request.

Published review decisions would serve as precedents for determining subsequent cases, and assessing the viability of proposed ones. The BPP could provide templates for record of proceedings and administrative review decisions, to ensure standardization.[54]

3. The BPP could make regulations pursuant to section 5(1) of the PPA to stipulate a standstill period after notice of award has been made, to restrain the execution and performance

[51] However, private attorneys may be hired and paid for such legal representation.
[52] As described in 8 2 1 above.
[53] PPA ss 5(a) & 16(23).
[54] For an example, see Kenya's administrative review decisions reported at: <http://www.ppoa.go.ke/2015-08-24-14-47-13/pparb-decisions> (accessed 23-06-2017).

of the contract. Fifteen working days could be stipulated as the standstill period.[55] It should be required that procuring entities shall indicate this in the solicitation documents and in the notice of award, to sensitize the bidders. This is tenable notwithstanding the fact that concluded contracts are administratively and judicially reviewable, considering that additional complications and costs arise when reviewing an executed contract.[56]

4. The decisions of the Federal High Court (FHC), including those on public procurement, are rarely reported. The system is thus denied the benefit of related case law. Public procurement matters currently rarely proceed to the Court of Appeal and the Supreme Court, whose decisions are fully reported. The BPP should undertake the reporting of public procurement decisions of the FHC, in conjunction with the FHC registry; as it arguably falls within its statutory functions.[57] It would be preferable to publish such law reports on BPP's website, to eliminate cost of paper-publication and enhance access. The free-public-access format of law reporting by the South African Legal Information Institute could be adopted.[58]

5. A Practice Direction or court rules, by the Chief Judge of the FHC,[59] may be used to achieve expeditious adjudication of procurement cases at the FHC, since the PPA does not provide time-limit for such proceedings. The Practice Direction or rules may abridge the time for filing, serving and responding to court processes on public procurement cases, and for hearing and giving decisions.[60] Expeditious adjudication would reduce litigation cost and the disruption of procurement process and contract.

6. It could be advisable to limit the procurement decisions of the FHC that may go on appeal; since there is an effective two tier administrative review with far-reaching remedies. This would entail amending section 54(7) of the PPA, and sections 241-242 of the Nigerian Constitution on right of appeal. Accordingly, it could be prescribed that appeals of final decisions of the FHC on procurement shall require the leave of the FHC or the Court of Appeal. Also, the court shall grant such leave based on certain conditions, including: (1) there is an important question of law requiring an appellate court's determination; or (2) the case involved

[55] This aligns with section 54(1) of PPA that stipulates similar timeframe for commencing internal (first instance) review.
[56] Guide to Enactment to Model Law 232 para 20.
[57] PPA s 5 (i), (q), & (r).
[58] Go to <http://www.saflii.org/> (accessed 12-11-2017).
[59] CFRN s 254, and FHC Act s 44.
[60] See 9 4 5 below for suggested timeframes.

fraud or corruption. This could strike a balance between the right of appeal and curtailing disruption to public procurement arising from multi-level adjudication.

9 3 2 South Africa

1. The factors that render procurement administrative review ineffective and unviable in South Africa include: lack of clear linkage or coherence among the procurement administrative review forums, leading to confusion on choice of forum;[61] and, lack of structure and effective remedies for the review.[62] The Municipal SCM Regulation 49 may be revised to become an ADR (mediation) option, since there is an effective internal appeal under section 62 of the Systems Act. Also, it accords with the constitutional principle of cost-effectiveness.[63] Aggrieved bidders may be required to exhaust this ADR before invoking the internal appeal under section 62. Safeguards against inappropriate compromises should be incorporated within the ADR: such as reporting and publishing the proceedings and decisions.[64]

The mechanism, timeframes and remedies for the administrative review under Municipal SCM Regulations 49 and 50, and Treasury Regulation 16A9.3 (a) should be stipulated. For this purpose, the Nigerian administrative review regime could be considered as a guide. The review options under Municipal SCM Regulations 49 and 50 should be properly linked, thus: where the proposed mediation under regulation 49 fails, further review would go to the Treasury; and then to judicial review if necessary. The above proposals entail amending the relevant subsidiary legislation, which does not require parliamentary involvement.

2. Section 62 of Systems Act should be interpreted and applied in a manner that sustains its general viability as a bidder remedies mechanism. This is not only in consideration of its advantages as an internal remedy, but also because relevant legal principles support such approach. It should be regarded that the decision of the Supreme Court of Appeal (SCA) in *CC Groenewald v M5 Developments (Pty) Ltd*[65] has overridden the High Court decision in *Loghdey v City of Cape Town*.[66] Thus, the current position should be that unsuccessful tenderers enjoy a right of internal appeal under section 62 of the Systems Act. Also, that it constitutes a viable

[61] For example, incoherence between the internal review under Systems Act section 62 and Municipal SCM Regulation 49; and no proper linkage of the stages of review under Municipal SCM Regulation 50. See 5 3 2 2 2 and 6 2 2 1 above.
[62] Except for the internal appeal under the Systems Act. See 6 11 2 above.
[63] SA Constitution s 217(1).
[64] See 8 2 3 above.
[65] [2010] ZASCA 47 para 21.
[66] (100/09) [2010] ZAWCHC 25.

internal remedy which aggrieved bidders must exhaust before resorting to judicial review,[67] by virtue of *DDP Valuers (Pty) Ltd v Madibeng Local Municipality*.[68] South African Supreme Court of Appeal should reconsider its position that section 62(3) exempts unconditional award and concluded contract from the internal appeal, so as to give effect to the law rather than making it fail.[69] The current position would only be tenable if a standstill period is enshrined within the legislation, to bar contracting authorities from unconditionally awarding or concluding contracts within the period.

Meanwhile, the practice by many municipalities of providing in their SCM policy or tender notification that award would be subject to section 62 appeal period should be sustained, as it safeguards the viability of the appeal. It is in the interest of municipalities, as well as all tenderers, and the public at large, that a viable internal appeal mechanism exists. It affords an opportunity for resolving procurement disputes cheaply and speedily; with less likelihood of resorting to court and increasing its burden.[70] Thus, the attendant disruption of procurement process is avoided.

3. Relevant authorities[71] should record and publish procurement administrative review decisions of the various forums on official websites. As noted earlier,[72] this enhances accountability, curbs unacceptable compromises, and acts as reference and guide for similar cases.

4. The limited remedies under the various administrative review mechanisms undermine their effectiveness; and tend to overburden the court that has practically become the first recourse. Thus, the remedies available within the various forums should be broadened, through legislative amendment. Remedies that could be provided are presented in 9 4 6 below.

The court in judicial review proceedings have wide ambit of remedies, as PAJA empowers it to "grant any order that is just and equitable".[73] However, South African courts require a paradigm shift, from restricting themselves to the traditional remedies to adopting a

[67] Pursuant to PAJA s 7 (2).
[68] [2015] ZASCA 146 paras 23-25.
[69] Argued in 5 3 3 above.
[70] The SCA in *CC Groenewald v M5 Developments* [2010] ZASCA 47 para 1 expressed its concern thus: "As this court has recently observed, awards of tenders in the public sector are a fruitful source of litigation which has led to courts being swamped with cases concerning complaints about the award of contracts." See also *Moseme Road Construction CC & others v King Civil Engineering Contractors (Pty) Ltd* [2010] ZASCA 13 para 1.
[71] Such as Municipalities and the Treasury.
[72] 9 3 1.
[73] Section 8(2).

flexible approach that achieves a middle ground. Such was the approach taken by the SCA in *Millennium Waster Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province*.[74] It found to be reviewable the award of a tender for the removal of medical wastes from public hospitals, which contract was already concluded and being performed. Rather than take the usual approach of simply invalidating the contract,[75] the court ordered a re-evaluation of the affected tenders within a timeframe, and held that the award shall be invalidated only if the re-evaluation shows that the applicant's tender should have won. Thus, performance of the contract (critical to public good) was allowed to continue within the short timeframe; the contractor's right to payment for the work done was preserved; while the challenger's right to remedy remained intact and enforceable in the defined circumstance.[76]

5. The current commencement deadline, the frequency and duration of procurement cases before the courts disrupt affected procurement processes or contracts, and impact negatively on the parties and the public.[77] The 180 days deadline prescribed by PAJA[78] for instituting judicial review is too long for procurement cases, considering that procurement is usually time-sensitive. Thus, rules of court (by national legislation)[79] could be made to fast-track procurement review proceedings. If the rule prescribes a shorter commencement timeframe, it will not be invalidated by the commencement timeframe in section 7(1) of PAJA. This is because such court rule (national legislation) will be of the same status with PAJA, it will be subsequent to PAJA, and the rule of interpretation that special legislation (the proposed rule of court) may override a general one (PAJA s 7(1)) may apply.[80] Another option could be amending section 7(1) of PAJA to allow for a shorter commencement timeframe for proceedings such as procurement judicial review. 20 days after actual or implied knowledge of the complained action or exhaustion of internal remedy is suggested.[81] Inadtion, court rules could provide for abridged timeframes and procedure for filing reply to review application, and

[74] 121 2008 (2) SA 481 (SCA).
[75] See Quinot (2008) *Stellenbosch Law Review* 117-120; Quinot (2011) *PPLR* 203; 7 9 2 1 above.
[76] See Quinot "Supplier Remedies" in *Procurement Regulation* 331-332.
[77] See *Millennium Waster Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 121 2008 (2) SA 481 (SCA) para 34.
[78] Section 7(1).
[79] SA Constitution 171.
[80] Captured by the Latin maxim: *Lex specialis derogat legi generali*: which is applied in national and international law. See H Grotius *De Jure belli ac pacis. Libri Tres* (1625) Book II Sect XXIX; CW Jenks *The Conflict of Law-Making Treaties* XXX BYIL (1953) 446.
[81] Court could in extraordinary circumstances minimally extends the time.

for hearing and determining the case, based on section 7(3) of PAJA.[82] Also, legislation could abridge timeframes and procedures for appeals of procurement cases before the SCA and the Constitutional Court. The above will strike a balance between bidders' right to redress and the need to minimize disruption of public procurement process, with the attendant negative impact on third parties and the public.

6. It is advisable to limit the number of public procurement cases that go on appeal from the High Court to the SCA and the Constitutional Court, achievable perhaps by the courts' strict or restrictive interpretation to the conditions for grant of leave to appeal. All appeals from the High Court to a higher court must be by leave of court, according to section 16(1) of the Superior Courts Act.[83] A leave to appeal may only be granted where the judge(s) concerned considers that: (1) the appeal would have a reasonable prospect of success; or (2) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration; or (3) where the decision concerned does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.[84] Strict interpretation of condition (2) above may mean limiting "other compelling reason" to where there is an important question of law requiring an appellate court's determination, which serves the interest of justice. For example, if "the case was of great public importance and raised issues that were complex and difficult to resolve";[85] or, the issues have not been considered by the appellate court before.[86] This strikes a balance between enriching jurisprudence and curtailing delays to public procurement process resulting from multi-level adjudication.

It is assumed that the current public procurement legal and institutional frameworks of Nigeria and South Africa would be retained; thus, only minimal reviews have been suggested above. Below is a proposed blueprint for any country, particularly in Africa, that seeks to design or redesign it bidder remedies system.

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[82] See 9 4 5 for suggested timeframes.

[83] See *Minister of Health and Another v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) paras 72-77; *Gentiruco A.G. v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) 608E-F; *Sita v Olivier NO*1967 (2) SA 442 (A) 450F-H;

[84] Superior Courts Act s 17(1). See DE van Loggerenberg & E Bertelsmann *Erasmus Supreme Court Practice* 2 ed (2015) vol 1, DR Harms *Civil Procedure in the Superior Courts* (1996) C1.7 – C1.3

[85] *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) para 73.

[86] *National Union of Metalworkers of South Africa obo M Fohlisa v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd)* [2017] ZACC 9, [2017] 6 BLLR 539 (CC), 2017 (7) BCLR 851 (CC), (2017) 38 ILJ 1560 (CC) para 74.

9 4 Blueprint for designing remedies systems

The blueprint briefly suggests options that may be adopted as the basic structure of a bidder remedies system.[87] It highlights their implications and hints at options that may be preferable.

9 4 1 Regulatory framework

The right to challenge public procurement decisions should be recognised or established by the primary public procurement legislation. It is easier to identify and apply the right where it is provided in the public procurement legislation itself, than by general administrative law. Besides, specific or special legislation (on public procurement) may override a general one.[88] Such review right established by a primary legislation is more secure than one established by subsidiary legislation. Subsidiary legislation is easily altered or abrogated by an authorised office/officer; and is inferior to primary legislation.[89]

It is beneficial to provide for other enforcement mechanisms, such as investigation, administrative remedial action and prosecution.[90] First, some breaches are better addressed through mechanisms other than bidder remedies. For example, investigation and prosecution are more suitable for procurement offences, such as fraud. Secondly, some breaches that escape bidder remedies could be redressed through these other mechanisms. For example, breaches may still be addressed after deadline for filing procurement review, by mechanisms such as investigation and administrative remedial action.

9 4 2 Grounds of review

Review grounds may be established by:

(1) a general administrative law stipulating specific grounds (such as bias, unlawfulness, and unreasonableness);

(2) procurement legislation making actionable any omission or breach of its provisions, which results in an actual or impending personal loss or injury;

(3) procurement legislation making any omission or breach of its provisions actionable per se.

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[87] For other views on how to design a bidder remedies system, see Gordons (2005-2006) *PCLJ* 427; The World Bank *Benchmarking Public Procurement 1 2017: Assessing Public Procurement Regulatory Systems in 180 Economies* (2016) 38-43.

[88] Captured by the Latin maxim: *Lex specialis derogat legi generali*: which is applied in national and international law. See H Grotius *De Jure belli ac pacis. Libri Tres* (1625) Book II Sect XXIX; CW Jenks *The Conflict of Law-Making Treaties* XXX BYIL (1953) 446.

[89] See CT Carr *Delegated Legislation: Three Lectures* (2016) chs 2 & 4.

[90] See ch 8 above.

Option 1 above is more suitable where there are several pieces of legislation on public procurement procedures. The implications of this option are that: (i) review grounds are easy to identify within that general legislation; (ii) the grounds apply to general administrative decisions; thus, have to be adapted for procurement matters; (iii) it is holistic in dealing with administrative law matters and infractions; but may be less effective in procurement matters, as it is not specialised. Thus, this option should generally not be adopted in establishing or redesigning a bidder remedies system.

The implications of option 2 are that: (i) it limits actions to breaches that result in injury or loss; (ii) thus, may reduce speculative actions; (iii) it reduces review opportunities, as breaches that have not caused loss or injury to bidders is not actionable; (iv) it may consequently reduce adjudicative intervention in procurement process and the resultant disruption. It balances bidders' right to review with the need for minimal disruption of procurement process. This is the most preferable of the three options (especially where alternative or secondary procurement enforcement mechanisms exist), as it contributes in reducing incidences and cost of review, minimizes disruption of public procurement processes and its attendant negative impact. This option is recommended for adoption considering its advantages over the others.

The implications of option 3 are that: (i) the complainant need not prove loss or injury occasioned by a breach; (ii) it enhances standing; (iii) it focuses more on enforcing compliance with procurement law than redressing injury for non-compliance; and (iv) it permits complaints that would have ordinarily been rejected for not disclosing actual or likely damage or injury. This is preferable where bidder remedies constitute the only effective procurement enforcement mechanism.

9 4 3 Exempted matters and standstill

No public procurement decision should be exempted from review. The implication of this is that no procurement infraction escapes review. This could be counterbalanced by requiring that applicants shall prove an actual or impending personal injury or loss arising from the challenged decision.

Another option is generally exempting concluded contracts from review, with necessary conditions. This is tenable considerin the impact that review concluded comtract may have on third parties and the public. Where this option is adopted, there must be a general prohibition on the procuring entity to take any step that would bring into force a procurement

contract while a challenge or appeal remains unresolved.[91] Also, a standstill period must be established, within which bidders are notified of a proposed award and given a set time, such as fifteen working days, to challenge the award or process before the contract is signed.[92] However, it should be stipulated that an urgent public interest could warrant the conclusion of the contract without observing a standstill, which shall be subject to review;[93] or that the review forum may order a lifting of the standstill, while a challenge or appeal is on-going, based on urgent public interest.[94]

The standstill period should be sufficient to enable bidders to reasonably identify any breach in the procurement process and apply for review. Thus, the statutory response period of public entities to request for information must be taken into consideration in prescribing a standstill period. It should be stipulated that standstill period shall begin to run from the date the procuring entity provides interested bidders with relevant information requested. If no challenge arises within this period, the contract may be signed, and exempted from review. This upholds *pacta sunt servanda* principle;[95] safeguards concluded contract from disruption by review; and, strikes a balance between the need for transparency and accountability in public procurement and the reality of extreme resource constraint.[96]

However, it should be stipulated that such a contract shall be subject to review where evidence indicates that it is tainted with fraud or corruption;[97] or it is concluded without observance of the standstill period. This ensures that there is no rush to sign contract to block review, and retains fraud or corruption as a vitiating element.

9 4 4 Parties

Right to apply for public procurement review (at first instance) should be extended to bidders that participated in the challenged procurement and suppliers that had interest and potential to participate in the process, but were directly or directly excluded, probably by absence of advertisement. Limiting review rights to actual bidders practically exempts the procurement method used from review. This is because it is potential bidders, who were excluded by a restrictive procurement method used by the procuring entity (such selective tendering or sole

[91] See UNCITRAL Model Law art 65(1).
[92] See Priess & Friton "Effective Challenge Procedures" in *WTO Regime on Government Procurement* 526-528.
[93] See Model Law art 22 (3)(c).
[94] See UNCITRAL Model Law art 65(3); Guide to Enactment 238 para 4.
[95] See Garner *Black Law Dictionary* 1217
[96] See Quinot "Supplier Remedies" in *Procurement Regulation* 335.
[97] UNCITRAL Model Law art 67(2)(c).

sourcing), that would ordinarily challenge the method. If potential bidders do not have review right, the procurement method used would hardly ever be challenged. Such restriction of review should not be adopted. Procurement method is very critical to the transparency and competitiveness of procurement; the more restrictive the method the less transparent and competitive the procurement.[98] However, standing should not extend to the public, as it would be unwieldy for the system, and enlarge the potential for disruption of public procurement and contract. Rather, mechanism should be provided to enable members of the public to easily report suspected procurement infraction and offences to a relevant investigative or prosecution authority, to trigger concomitant administrative remedial action, sanction or prosecution.

The respondents must include the procuring entity and the successful bidder (where contract has been awarded). Legislation may require that other bidders will be informed of the review proceedings, as they may want to be involved. However, it should not make this requirement to vitiate a review proceeding where such notice is not issued. The contrary would be disruptive; notwithstanding that the requirement is arguably not fundamental, as any bidder that is aggrieved by the procurement decision should have challenged it. Notices on procurement review proceeding instituted could routinely be displayed on the website of relevant public procurement regulatory body or the procuring entity.[99] Any other electronic platform forming part of an e-procurement system could also be used. With this, any interested bidder would be regarded as having actual or implied notice of the proceeding, to instigate it to seek to participate if it deems fit.

For further review or appeal, parties should be limited to only those that participated in the first instance review.[100] There is an option of allowing other parties to apply and join at this stage. However, former should be adopted, as it would curtail speculative litigation. Besides, there should be an end to litigation.

9 4 5 Forum and proceedings

The three levels of public procurement review: internal administrative review, external administrative review, and judicial review: may be established for a system. However, any of these stages could be excluded to reduce the review timeline and cost. Excluding judicial review will significantly reduce challenge timeline; but the system will be denied the benefits

[98] See generally E Carbon & S Arrowsmith "Procurement Method in the Public Procurement Systems of Africa" in G Quinot & S Arrowsmith *Regulating Public Procurement in Africa* (2012) 261.
[99] Caborn & Arrowsmith "Procurement Methods" in *Procurement Regulation* 305.
[100] *Amicus curiae* could be permitted.

of the derivative case law. Excluding internal review or making it optional allows the aggrieved party direct access to the higher forum, but denies the system of the earliest and least disruptive resolution.[101] External review, under an independent and impartial body, could largely obviate the need for the usually lengthy judicial review; excluding it would remove this benefit.

The three stages should be established; designed in the following manner to minimize unwieldiness. The forums should be hierarchical; and each level of review must be exhausted before recourse to the next. A lower forum's review decision should constitute a subject-matter of review at the higher forum. Evidence tendered before one level should be relied on at another level, except where new evidence is required.

The table below presents suggested timeframes for applying and completing proceedings at the various stages.

Forum	Application	Respondent reply	Conclusion & decision
Internal review	Fourteen days after applicant became actually or impliedly aware of the breach.	Ten days after being served the application.	Fourteen days after deadline for the reply.
External review	Fourteen days after conclusion of or deadline for internal review.	Ten days after being served the application.	30 days after deadline for the reply.
Judicial review	20 days after conclusion of or deadline for external review.	Fifteen days after being served the application.	60 days after deadline for the reply.

Special procedures must be designed to accelerate proceedings to meet the above deadlines.[102] These include: filing all evidence to be relied on together with the application or reply, using

[101] See Guide to Enactment 230 para 11.

[102] See Gordons (2005-2006) *PCLJ* 437-438 for arguments for and against strict timelines,

affidavit instead of oral evidence; adopting motion instead of writ proceedings;[103] day-by-day hearing; limiting the number of adjournments; and using mainly written argument.

Internal review should be conducted in the form of ADR (negotiation or mediation). Mediation would involve inviting an external mediator to facilitate the reconsideration process by the procuring entity. This minimises the likelihood of bias and enhances acceptability and robustness of remedies. Measures to curb inappropriate compromise must however be incorporated; such as keeping and publishing records of proceedings. The external review forum should be the public procurement regulatory body. This is usually effective and obviates the cost of running a parallel adjudicatory agency. However, the structure for its review function should be defined. Judicial intervention should be in the form of judicial review, not appeal/merit review (which is more intrusive).[104] Limit judicial review to court of first instance; while permitting appeal, by leave of court, only where important question of law was raised requiring determination by a higher court. These will preserve the benefits of the various stages; while achieving speedy dispensation of cases.

9 4 6 Remedies

Remedies should include interim and final reliefs. Interim reliefs, such as suspension, interdict or interim injunction, preserve the status quo; so that the final remedy is not rendered vain. It also prevents parties from continuing down a non-compliant path, risking waste of time and costs.[105] Thus, incorporating it is worthwhile. However, it is advisable that suspension should not be automatic, to enable the forums to refuse it where urgent public interest necessitates it.[106]

Final remedies for administrative review would be as spelt out by legislation. Available remedies at administrative review stage should include powers to:

- prohibit the procuring entity from taking an unlawful action or decision;
- compel the procuring entity to take a decision or to act in compliance with the law;
- nullify in whole or in part an unlawful act or a decision of the procuring entity;
- revise an unlawful decision of the procuring entity or substitute its own decision for such a decision;
- confirm a decision of the procuring entity;

[103] For judicial review.
[104] See 7 3 above.
[105] Guide to Enactment 235 para 32.
[106] See UNCITRAL Model Law arts 65(3), 67(3)(b) & (4)(b); Guide to Enactment 90 para 16.

- overturn the award of a procurement contract or a framework agreement concluded in violation of standstill period;
- terminate procurement proceedings;
- take such alternative action as is appropriate in the circumstances.

The recommended remedies above do not include cancellation of a procurement contract; and payment of monetary compensation; owing to reasons adduced in 9 4 3 above and the second paragraph below.

Judicial remedies may also be defined by legislation or left for the inherent jurisdiction of the court. Considering the special nature of public procurement and that court is inclined to traditional remedies, legislation should provide for or enjoin court to give tailor-made remedies to suit the specific circumstances of various cases. Such remedies should include:

- set aside of procurement contract only when tainted with fraud or concluded in violation of standstill period;
- revision of procurement or administrative review decision;
- substitution of a challenged decision in prescribed circumstances;[107] and,
- taking alternative decision that is appropriate in the circumstance, such as conditional invalidation.

Conditional invalidation entails the court declaring that a procurement contract tainted with irregularity will stand invalid, only if after a court-ordered re-evaluation is conducted it is found that the applicant would have won the award but for the irregularity.[108] Thus, the contract remains valid and its performance continues, pending the re-evaluation. Consequently, disruption of the procurement is minimized and the monetary claim of the initially successful contractor to the quantum of work performed is preserved up to the point the contract may be set aside.

Awarding monetary compensation or damages is not advisable considering the severe resource constraint in Africa. However, awarding costs to a deserving party could be tenable. Monetary remedies may be limited to where all these are present: the procurement process is tainted with bad faith, fraud or corruption; it has become too late to revise the procurement decision; and, the applicant has suffered actual personal damages. Damages should also be awarded to a successful bidder, who has signed and commenced implementation of the contract

[107] See 7 9 2 2 above.

[108] Adopted in *Millennium Waster Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 121 2008 (2) SA 481 (SCA). See Quinot "Supplier Remedies" in *Public Procurement Regulation* 331.

within reasonable time in the absence of litigation, if a challenge later arises and the contract award is set aside for breach of procurement law.[109] This would be particularly tenable where there are no available remedies other than compensation or damages. Where damages are awarded owing to bad faith, fraud or corruption, it should be stipulated that officials involved shall be personally liable to pay or defray the damages. Other remedies such as investigation, administrative sanctions and prosecution could be invoked to redress breaches where review has become infeasible.

In all cases, available remedies must be just and equitable; and strike a balance between the affected interests. Importantly, review decisions must be in writing, with reason. They must be binding to be effective.

9 5 Concluding remarks

As was stated in the introduction, the study was limited to a doctrinal and comparative examination of the legal texts on bidder remedies and other enforcement mechanisms on public procurement in Nigeria and South Africa. The key finding is that the design of the bidder remedies systems affects their effectiveness. This is the rationale for presenting the blueprint for designing remedies systems above. A state contemplating establishing or redesigning its bidder remedies system must be sensitive to its environment, while considering lessons from the law, practices and realities around bidder remedies in other jurisdictions, especially in similar settings. It will avoid the negative aspects and outcomes of those systems studied, while adapting those positive aspects that are workable within its environment. It may be wiser to test the model or design being contemplated before it is crystalized. Perhaps the way to achieve this is to set the design of the remedies system in a subsidiary legislation made by an authorised peron or body, such as the procurement regulatory agency, which would easily be amended or repealed, as the need arises. The aspect of the remedies systems that, from the outset, ought to be established in the primary legislation are the scope of right of procurement review, the forum(s), and, the available remedies or some of them. As some of the other aspects of the remedies system are confirmed to be acceptable and effective, they could be secured by enshrining them in the primary legislation. However, specific procedural rules for procurement review at the various forum(s) are better left in subsidiary legislation made by relevant

[109] This contrasts with a view in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC).

authorities, for easy of revision, to make procedures more effective based on changing circumstances and experience.

Empirical study is required to determine the extent to which practical factors such as: cost and length of review, rate of success in pursing review process, suppliers' fear of victimization for pursuing review process, lack of knowledge or understanding of the remedies system: may impinge on the use and effectiveness of the systems. This could be undertaken as an academic study; or as a research by or in collaboration with the public procurement regulatory agencies. The findings from such study will help the regulatory bodies to ascertain the aspects to focus its attention to redress. For example, where lack of knowledge or understanding of the remedies system is identified as a major factor militating against the use and effectiveness of the system;[110] it could carry out relevant enlightenment programme. This may include disseminating a simplified guide on the remedies system to the stakeholders. Where fear of victimization is high, the regulatory body could establish an easily-accessible feedback mechanism, where suppliers could report such victimization; for the officials involved to be sanctioned, and to curtail the occurrence.

This study affords other countries some lessons on adopting practices and regimes on procurement remedies and enforcement that are effective; while guiding them away from the legal and related factors that weaken effectiveness.

[110] This would usually be the case in jurisdictions where the remedies system is relatively nascent or where it is incoherent or complicated.

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